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October Term, 1911.

368 - 18835.

ESTHER MERCY,

Appellee,

vs.

MARION TALBOT,

Appellant.)

APPEAL FROM

CIRCUIT COURT,

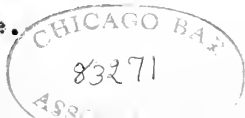
COCK COUNTY.

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VOL. 189

1 I.A. 1

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court for \$2,500 against appellant in an action for slander. (At the time it is charged the slanderous words were spoken, appellee was a student at the University of Chicago, and appellant was "Dean of Women" of that institution. Although it is charged in the declaration that a variety of slanderous words were spoken by appellant of and concerning appellee at various times, the only words relied on by appellee as a basis of recovery are, "We know very well you are getting your money from men. We do not consider you any more than a woman of the streets." It is alleged that these words were spoken by appellant of and concerning appellee on two different occasions; that the first of these occasions was on December 8, 1910, and that the second occasion was on January 9, 1911. Appellee claims that on December 8, 1910, Dean Vincent of the University of Chicago and a Miss Robinson, who was also connected with the University as "Head of the Housing Bureau" and teacher, were present, and heard the slanderous words spoken, and that on January 9, 1911, her brother, Henry D. Mercy, and her fiance, Warren E. Reynolds, were present and heard the slanderous charges repeated. By innuendo it is alleged that by the words spoken it was meant and intended to charge appellee with being a common prostitute and with being guilty of fornication. Appellant pleaded the general issue.





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Appellant urges that the language charged is not actionable per se; that in order to show that the words were actionable the pleader should have added by way of inducement and colloquium facts from which it should have been made to appear not only that appellant intended by the words spoken to charge appellee with being a prostitute and with being guilty of fornication, but that by reason of the circumstances under which they were spoken those who heard them would and did understand them to amount to such charge; that an innuendo can not enlarge the meaning of the words spoken or take the place of inducement and colloquium; that the slander was invited and the occasion privileged and that actual malice must be shown to exist before appellee is entitled to recover.

In these contentions appellant has, as we view it, started out with a false premise. To our minds the words charged, without inducement, colloquium or innuendo, in themselves amount to a charge that appellee was a common prostitute and that she had been guilty of fornication. Words must be construed according to their common acceptance. They must be construed to mean what they would commonly be understood to mean. Schmiesseur v. Ersilich, 92 Ill., 347-363; Miller v. Johnson, 79 Ill., 58. To say of a woman that she is a street walker, or a woman of the streets, is equivalent to charging her with indulging the practices indulged in by women of the streets or street walkers. A woman of the streets or a street walker is commonly understood to be a woman who prostitutes herself for money and who walks the streets in search of customers for her wares. Therefore, to say of a woman that she is "a woman of the streets", "a street walker" or no better, and that "she gets her money from men", amounts to charging her with being a woman who prostitutes herself for money and solicitates patronage on the streets. In Ross and Plancea,





Street-walking is defined to be "the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours, endeavoring to induce men to follow her for the purpose of prostitution". In Pinkerton v. Verberg, 78 Mich., 573, the nisi prius court instructed the jury, in part, as follows: "Disorderly conduct for which an arrest might be made without a warrant, if committed in the presence of the officer, would include what is commonly termed 'street walking'. That is the offense of a common prostitute offering herself for sale upon the streets at unusual or unreasonable hours endeavoring to induce men to follow her for the purpose of prostitution." The Supreme Court of Michigan, in reviewing the case, used the terms "street walker" and "common prostitute" as synonymous. The term street walker is defined in Webster's New International Dictionary as "a common prostitute who seeks trade in the streets." While the expression "woman of the streets" has never been defined by law writers or lexicographers, so far as we can discover, there can be no doubt that it is but another form of expression intended to convey the same idea and understood as meaning the same thing, as "street-walker", and particularly when coupled with words charging her with getting her money from men, is commonly understood and accepted as charging the person of whom it is spoken with being a common prostitute who seeks trade upon the streets. Appellant herself evidently so understood it, for when asked: "Did you ever call her a prostitute?" she replied, "Never. I never used such language. I never in any conversation stated that she was no better than a woman of the streets." The words charged, therefore, are actionable per se.

The words being actionable per se, there was no necessity for inducement, colloquium, innuendo or proof of the meaning that was intended to be conveyed or what was understood by the hearers to be charged.

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In order that one who speaks slanderous words may avail himself of the defense of privilege, because the speaking was invited or because of any other circumstance from which privilege could arise, it must appear that the speaker acted from a sense of duty in good faith, with an honest belief in the truth of the charge made and without malice or an intention to injure the person of whom the words were spoken, and the burden is on the defendant to show that the occasion was privileged. Everett v. DeLong, 144 Ill. App., 496; Barth v. Hanna, 158 Ill. App., 20. In the case at bar, appellant not only denied the speaking of the slanderous words charged, but also testified in positive terms that she never had heard, understood or believed that appellee was a woman of the street, a prostitute, a lewd woman or lacking in virtue prior to the time she is charged with having uttered the slanderous words. The following were some of the questions asked of appellant and the answers made by her thereto in this connection:

"Q. At the time Miss Mercy was at this institution and before she left, did you have any idea, or think, that she was an immoral woman sexually? A. No. I never suggested or intimated it and I never intimated it to Dean Vincent at any time or place.

"Q. In the conversation which occurred when you were present - when the young lady was present - was it suggested by you or thought by you, or did you ever say that she was a prostitute? A. No.

"Have you ever in any conversation used any language from which it could be inferred or understood by anyone else that this woman (Miss Mercy) was a woman of the streets or an immoral woman, or in any sense lacking in virtue, or was a prostitute or a lewd woman? A. No. Of course, I cannot tell what inferences or conclusions other people might draw, but I never intimated such a thing, or even thought it.

"Q. Did you ever use any language from which such a thing could be inferred if people interpreted the language you used rightly? A. I never in my own mind thought such a thing."

Instead of showing that the words were spoken in good faith from a sense of duty, in the honest belief of their truth, and without malice or a purpose to injure appellee, the testimony of appellant establishes beyond controversy

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exactly the contrary, and that if she spoke the words at all, she was actuated by express malice in so doing. Under that state of facts, the defense of privilege is not available to appellant. Thomas v. Fischer, 71 Ill., 576. Whether the defense of privilege is open to a defendant who denies the speaking of the slanderous words, we do not decide. What we do hold is that there can be no defense of privilege when the speaking of the slanderous words was actuated by express malice. Eism v. Badger, 23 Ill., 445; Inland Printer Co. v. Econological Half Tone Supply Co., 99 Ill. App., 8; Wharton v. Wright, 30 Ill. App., 343.

The words charged being actionable per se and not being spoken under circumstances rendering the speaking privileged, malice is inferred upon proof that the words were spoken and that they were false. If the proof also shows that the speaker knew or believed them to be false, or had no reason to believe, and did not believe them to be true, and that they were spoken willfully, express or actual malice is proven. Thomas v. Fisher, 71 Ill., 576; Ransom v. McCurley, 140 Ill., 626.

On the question of whether the words were spoken at all, the proof is conflicting. As to the occasion of December 6, 1910, appellee testified that they were spoken by appellant in her presence and in the presence of Dean Vincent and a Miss Robinson. All of those present at that conversation, except appellee, testify that no such words were spoken. If the verdict of guilty was based on this incident, it is clearly against the weight of the evidence and the judgment should not stand. The only persons shown by the proof to have heard the conversation of January 9, 1911, were the parties to the suit and Henry D. Mercy, appellee's brother, and Warren E. Reynolds, her fiance. Appellee, her brother and her fiance all testify the slander was spoken by appellant. Appellant alone denies

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it. While there was proof introduced by appellant, some of which was competent, tending to impeach the general reputation of appellee and her fiancé for truth and veracity, no such proof was offered as to Henry D. Mercy who corroborates the testimony of his sister and Reynolds. It was for the jury to say how much weight and credit should be given to the witnesses, and we do not feel justified under the rules of law, in setting up our judgments, based on the reading of the evidence, against the judgments of the twelve jurors and the trial judge who heard the witnesses and observed them as they gave their testimony, and in declaring that the testimony of appellant is more worthy of belief than the testimony of the other three, and must, therefore, decline to reverse the judgment because contrary to the manifest weight of the evidence.

At the instance of appellant the court instructed the jury, in substance, that the communications alleged to have been made were qualifiedly privileged and that appellee could not recover, except upon proof by a preponderance of the evidence that the speaking of the same was prompted by actual malice. At the instance of appellee the jury were instructed, in substance, that appellee could recover upon proof of the publication of the slanderous words without proof of express or actual malice. These two instructions are irreconcilable. One tells the jury appellee can, and the other tells them that she can not recover without proof of actual malice. The one given at the instance of appellant is based on the theory that the communication was qualifiedly privileged. The one given at the instance of appellee is based on the theory that it was not privileged. Whether the occasion was privileged is a question of law, (Everett v. DeLong, 144 Ill. App., 496), and we have seen that under the facts in this case the question of privilege was not involved. The giving of the instructions





asked by appellee was, therefore, proper, and the giving of the one asked by appellant was improper. Appellant is not in a position to complain that the instructions were inconsistent when the inconsistency arises from the giving of an improper instruction at her instance. There is no error available to appellant in the giving of instructions.

It is lastly urged that the verdict was excessive. It was for \$2,500. No special damages were alleged or proven and the jury were so instructed. The only injury appellee is shown to have sustained was to her feelings. When slanderous words are shown to have been spoken maliciously, the jury may award punitive as well as compensatory damages. In fixing the amount of punitive damages a jury has a wide discretion and their verdict should not be disturbed, unless the amount fixed is so far out of proportion to what the plaintiff should recover as to evidence passion or prejudice on the part of the jury. Sutherland on Damages, Ed. 1882, Vol. 1, page 742; Drohn v. Brewer, 77 Ill., 280; Smith v. Wunderlich, 70 Ill., 426; Holmes v. Holmes, 64 Ill., 294. The effect on appellee was apparently somewhat unusual. So far as disclosed, no friends abandoned her, her brother testified that he did not believe the accusation and he still stands by her. Her fiance was not turned from her. Her counsel takes pains to mention in his brief that they have since been married. These were the only two persons who heard the slander spoken on the only occasion when the proof will warrant a finding that it was spoken at all, and the only persons who so far as the evidence shows ever heard it, except when appellee repeated it. Instead of nursing her hurt, she seems to have considered the incident an asset. She had been at one time a member of a traveling theatre troupe and endeavored to get a play written in which she might appear as the star performer after she should have become notorious through the trial of this case. She posed

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for pictures for the newspapers and had interviews with newspaper men concerning it, and generally so deported herself as to create the impression that she rather revelled in the situation than otherwise. Another fact that would seem to indicate that she was inclined to be oblivious to public opinion and criticism is that she unhesitatingly admitted her engagement to marry a man who already had an undivorced living wife, as she knew, and whom she knew had been convicted of having lived in a state of open and notorious adultery with another woman. These things are not mentioned as indicating that appellee was lacking in virtue, but as tending to suggest that this suit may have been prosecuted in the hope of gain rather than to recover recompense for lacerated feelings. In Mullin et al. v. Spangenberg, 118 Ill., 140, the Supreme Court said:

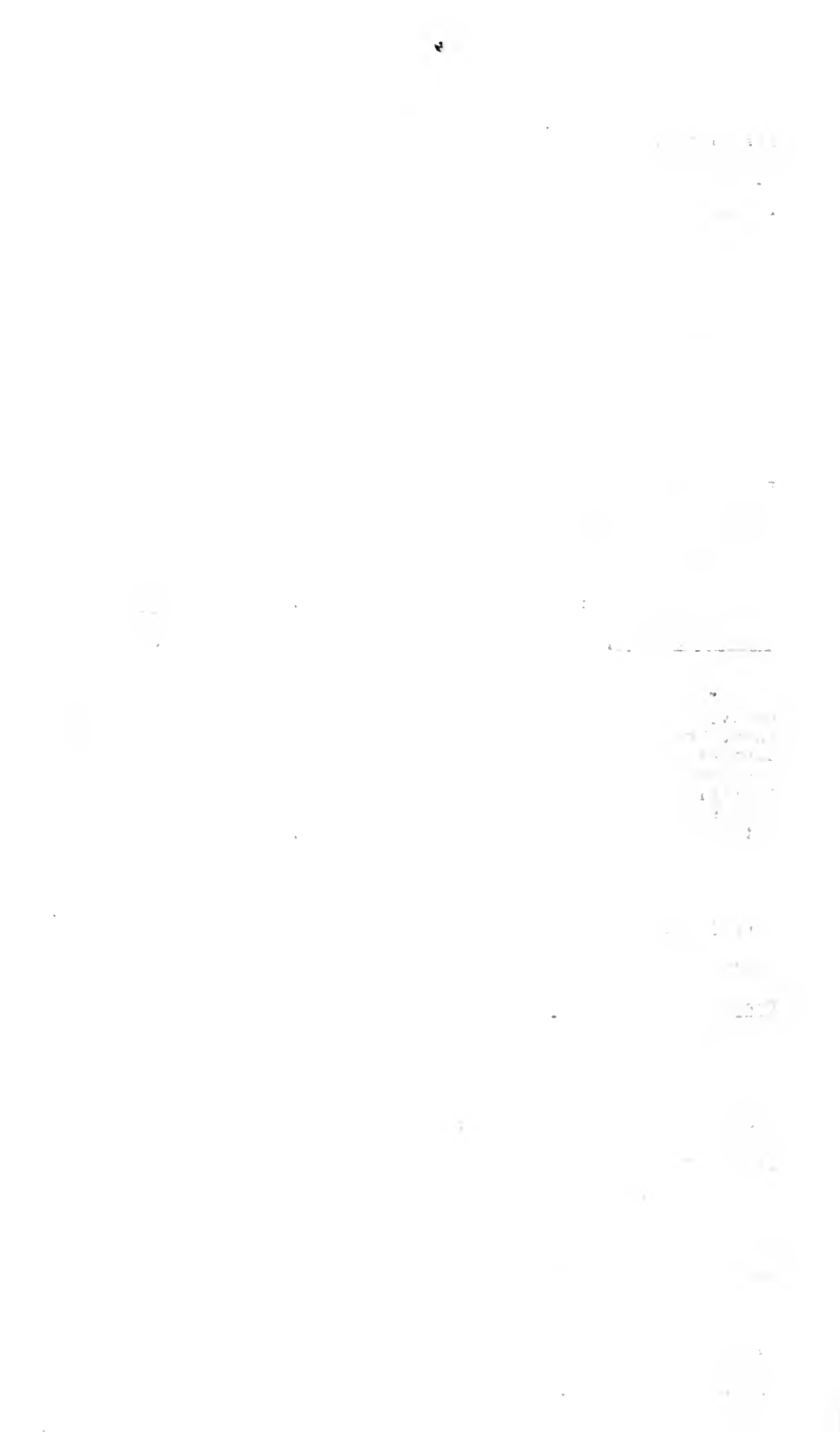
"Where a plaintiff entitled to vindictive damages offers no evidence of the defendant's wealth with a view of enhancing them, he in effect says, 'I ask no damages against the defendant except as a mere individual, without any regard to his property or estate, whether it be much or little', - and in that kind of a case the jury have no right to give any more damages than they would if it had affirmatively appeared that defendant was without pecuniary resources."

There was no proof offered of the financial worth of appellant, and the question whether the verdict is excessive must be determined as if she were known to be penniless.

Reeson v. Goessard Co., 167 Ill. App., 561. From every consideration of this record, as it stands, we are forced to the conclusion that the verdict and judgment are so grossly in excess of what appellee ought to recover as to indicate that the jury were influenced in fixing the amount by passion or prejudice.

Other errors are complained of by appellant, but none of them in our judgment are of sufficient importance to warrant extending this opinion for their discussion.

Because the damages fixed by the jury are grossly excessive, the judgment of the Circuit Court is reversed and the cause remanded.



October Term, 1912. No.

446 - 18916.

JACOB E. HANSEN,  
Appellee,

vs.

SARAH J. COLE et al.,  
On Appeal of  
MICHAEL SALTER,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COCK COUNTY.

108 I.A. 19

STATEMENT OF FACTS BY THE COURT:

Jacob E. Hansen brought this suit in the Superior Court to foreclose a trust deed given by Sarah J. Cole and F. R. Cole, her husband, to secure the payment of certain obligations held by Hansen. Eben F. Runyan was the trustee named in this conveyance. Besides the Coles and Runyan, Michael Salter, Elizabeth Salter and Libbie Salter, subsequent mortgagees, were made defendants. The Hansen trust deed was subject to a prior one given to secure other substantial obligations of the Coles, but neither the trustee named in the first trust deed nor the holders of the obligations secured thereby were made parties to this proceeding. The rents and profits of the premises were conveyed by the Hansen trust deed as part of the security. They were not so conveyed by the Salter mortgage. On the day following the filing of the bill a receiver was appointed by the court, under and solely because of the provisions of the Hansen trust deed, to collect the rents and profits of the premises described therein. There was no finding that the Coles were insolvent. The Salters were non-residents and not being personally served with summons, notice to them of the pendency of this suit was published. They did not appear and were defaulted. On February 18, 1904, a decree of foreclosure and sale was entered. On February 29, 1904, Sarah J. Cole, the owner of the equity of



redemption, conveyed the premises to Elsie K. Hansen, wife of complainant. On March 17, 1904, the premises were sold by the master to the complainant, Hansen, for the amount found due him, together with interest thereon and costs of court and the expenses of sale. The amount found due the complainant included interest paid by him on the obligation secured by the first trust deed. Later, by leave of court, the Salters filed answers to the bill of complaint and also filed a petition asking that the receiver be required to report his acts and doings as such and that the receivership "be extended to and include the answers" of the Salters, and their claims set up in said answers. They also, on December 30, 1904, filed a cross bill in which they seek a decree directing an accounting of rents and profits of said premises due from Jacob E. Hansen and collected as rents by the receiver, and that the amount found due on such accounting be turned over to them to the extent of their claims under their mortgage. Sarah J. Cole, F. R. Cole, Jacob E. Hansen and Elsie K. Hansen all answer <sup>ed</sup> the cross bill. These answers collectively put in issue whether the complainants in the cross bill have any claim against the Coles, and whether in any event they have any right to an accounting of the rents and profits arising from the mortgaged premises or to such rents and profits. On March 25, 1905, the receiver, pursuant to an order of court, filed his reports of moneys received from September 22, 1903, the date of his appointment, to March 17, 1904, the date when the premises were sold under the decree of foreclosure and of moneys paid out by him from the said date of his appointment to March 23, 1905, the date of his report. The report shows \$2,582.39 more paid out than received, which amount the receiver says was advanced to him by Jacob E. and Elsie K. Hansen. The Salters objected to this report and the same, together with the objections thereto, were on April 3, 1905,





referred to Joseph V. O'Donnell, <sup>2</sup>master in chancery, to whom the cause had already been referred, to take proofs and report his conclusions thereon. On May 27, 1907, the master filed a report to which Jacob E. Hansen and the two Coles had filed objections before the master, which had been overruled. Apparently no action on this report was taken, but the matter was then re-referred to the same master in chancery. On September 22, 1911, the Salters filed, without leave of court, some amendments to their cross bill by which amendments they undertook to change it to one for leave to redeem from the sale of March 17, 1904. This amendment was stricken from the files because presented too late and without leave of court. On April 24, 1912, the master filed another report, finding that the receiver still had in his hands \$600 of funds collected by him and not expended; that it belonged to Sarah J. Cole as the owner of the equity of redemption, and recommended that a decree be entered directing the receiver to pay that sum to her. The master further found that the Salters were not entitled to any portion of that fund or to any claim against the receiver, and recommended that their cross bill be dismissed for want of equity. To this report the Salters filed no objections or exceptions, although they on the day the report was filed obtained leave to file exceptions in seven days. The exceptions of the Coles to the first report of the master were ordered to stand as their exceptions to the last report. On June 19, 1912, a decree was entered in which all exceptions to the master's report were overruled, and the court found that there was \$600 in the receiver's hands undistributed; that Sarah J. Cole was entitled to it; that the Salters were not entitled to any of it, or to any claim against the receiver, and that there was no equity in their cross bill and ordered that the receiver pay to Sarah J. Cole the \$600 found to be in his hands; that the receiver's report



be approved, except as modified by the decree; that the cross bill of the receiver be dismissed for want of equity and that the decree of foreclosure entered February 18, 1904, and all proceedings thereunder be confirmed. From this decree Michael Salter has perfected this appeal.

MR. JUSTICE GRAVER DELIVERED THE OPINION OF THE COURT.

A judgment or decree will never be reversed at the instance of a party whose rights are in no way injuriously affected thereby. Grand Tower Min. & Trunap. Co. v. Cady, 96 Ill., 436; Brown v. Woodley, 160 Ill., 433-437; Ransom v. Henderson, 114 Ill., 528-531; Tulker v. Tink, 159 Ill., 322-324; Schwartz v. Rister, 186 Ill., 209-217; Moore v. Jenks, 173 Ill., 157-164; Glee v. Murphy, 225 Ill., 58-61.

While appellant has assigned several errors on this record, the only injury he claims to have suffered by reason of the decree appealed from is that he was thereby deprived from having the rents derived from the mortgaged premises during the pendency of the foreclosure proceedings and until the expiration of the equity of redemption applied to the obligation held by him against the mortgagor.

An examination of the record fails to show that he was entitled to have that rent so applied. A party is not injuriously affected by being denied what he was not entitled to receive. It is, therefore, wholly immaterial to him how many errors the court may have committed in the various steps taken in this case.

The rents from pledged premises belong to the owner of the equity of redemption until the expiration of the period of redemption, unless the same have been pledged as additional security. Provided that where the debtor is the owner of the

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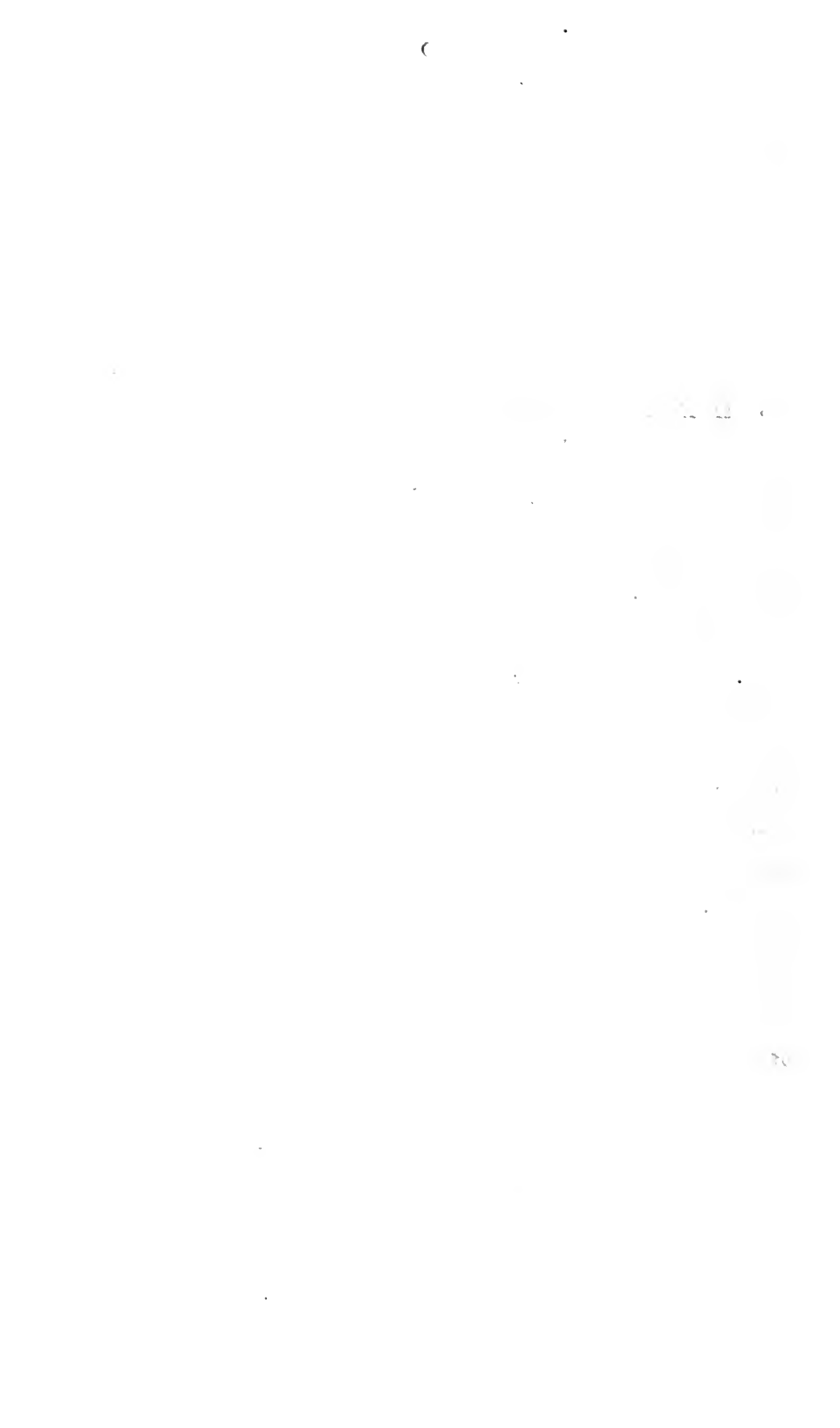
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equity of redemption and there is a deficiency decree, or it is otherwise made to appear that the pledged premises are insufficient or scant security, and there is a finding that the obligors are insolvent, a receiver may be appointed to collect the rents during the period of redemption to the end that the same may be applied to the payment of any deficiency decree that has been or may be entered. Ball v. Marake, 202 Ill., 31; First Natl. Bank v. Ill. Steel Co., 174 Ill., 140.

Appellant's mortgage did not convey the rents of the premises as part of the security. He alleged in his cross bill that the premises were scant security for the debts for which the same were pledged and also that the Coles were insolvent, but there was no evidence offered to support either of those averments and no finding in the decree concerning them. So far as this record shows, the property here involved may be ample security for all it is pledged for and the Coles may be amply able to pay all their obligations. Even if proof of those averments had been made, it would not have been effectual to show his right to the rents. The cross bill was not filed until December 30, 1904. At that time Elsie K. Hansen was the owner of the equity of redemption. She had purchased the same ten months before for a valuable consideration and had not assumed or agreed to pay the debt secured by appellant's mortgage. The rent during the period of redemption was, therefore, her property, and there is no way known to the law by which appellant could have taken the same from her to pay the Cole obligation. Standish v. Musgrove, 223 Ill., 500-506; Longley v. Wilk, 171 Ill. App., 419.

The fact that upon the filing of the original bill a receiver was appointed at the instance of Jacob E. Hansen under the provisions of his trust deed, and that the sequel shows such appointment was unnecessary for the protection of Hansen's rights, gives to appellant no additional claim on



the rents collected by such receiver. A receiver is an officer of the court and holds the funds in his hands for the benefit of the persons the court shall find are entitled to the same. Davis v. Dale, 150 Ill., 339; Bunrecht v. Kuhlke, 225 Ill., 189. In this case, the court correctly found that appellant was not entitled to or interested in the rents in the hands of the receiver. Whether the receivership was necessary at all or was continued longer than it should have been are, therefore, matters of no concern to appellant.

Appellant urges that the court at the time the default decree was entered against him did not have jurisdiction so to do by reason of the fact that the affidavit of non-residence was insufficient. After the decree was entered appellant entered his general appearance in the court, asked and obtained leave to answer the original bill under the provisions of section 12 of the chancery act, and did answer it. He also filed a cross bill which after answers were filed to it, was referred to the master, and he was heard fully on the issues made both on the original bill and the cross bill, both before the master and before the chancellor, and after about seven years of litigation, during which the default decree was held in abeyance, it was confirmed. He is too late now to complain that the service by publication on him was defective. Humphreys v. Steele, 108 Ill. App., 111.

Appellant also complains that his amended cross bill seeking a right to redeem the mortgaged premises from the foreclosure sale was stricken from the files. It was filed without leave of court, nearly seven years after he had entered his general appearance in the case and filed his cross bill and more than seven years after the sale from which he sought to redeem. His right to redeem, if he ever had any, had long since been barred by limitation before he made any attempt to

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$$C_{\zeta} = \frac{1}{2} \left( \frac{1}{\zeta} + \frac{1}{\zeta} \right) = \frac{1}{\zeta} \quad (25)$$

$$C_{\eta} = \frac{1}{2} \left( \frac{1}{\eta} + \frac{1}{\eta} \right) = \frac{1}{\eta} \quad (26)$$

$$C_{\theta} = \frac{1}{2} \left( \frac{1}{\theta} + \frac{1}{\theta} \right) = \frac{1}{\theta} \quad (27)$$

$$C_{\iota} = \frac{1}{2} \left( \frac{1}{\iota} + \frac{1}{\iota} \right) = \frac{1}{\iota} \quad (28)$$

$$C_{\kappa} = \frac{1}{2} \left( \frac{1}{\kappa} + \frac{1}{\kappa} \right) = \frac{1}{\kappa} \quad (29)$$

$$C_{\lambda} = \frac{1}{2} \left( \frac{1}{\lambda} + \frac{1}{\lambda} \right) = \frac{1}{\lambda} \quad (30)$$

$$C_{\mu} = \frac{1}{2} \left( \frac{1}{\mu} + \frac{1}{\mu} \right) = \frac{1}{\mu} \quad (31)$$

$$C_{\nu} = \frac{1}{2} \left( \frac{1}{\nu} + \frac{1}{\nu} \right) = \frac{1}{\nu} \quad (32)$$

$$C_{\xi} = \frac{1}{2} \left( \frac{1}{\xi} + \frac{1}{\xi} \right) = \frac{1}{\xi} \quad (33)$$



avail himself of it. There was no error in striking his amended cross bill from the files.

Some other questions have been argued by appellant. They are, however, without merit. To discuss them in detail would require an unwarranted extension of this already too long opinion.

Finding no reversible error of which appellant can complain, the decree of the Superior Court is affirmed.

DECREE AFFIRMED.



October Term, 1918. No.

487 - 18958.

NELLIE CARLIN, Administratrix of  
the Estate of Joseph Doskofsky,  
Deceased,

Appellee,

vs.

MICHIGAN CENTRAL R. R. CO. et al.  
On Appeal of  
ILLINOIS CENTRAL RAILROAD COMPANY,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

189 L.A. 23

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

This suit was brought by the administratrix of the estate of Joseph Doskofsky, deceased, against the Michigan Central Railroad Company and the Illinois Central Railroad Company to recover damages for the negligent killing of the deceased. Before final judgment the suit was dismissed as to the Michigan Central Railroad Company. Judgment was finally entered on the verdict of a jury against the Illinois Central Railroad Company, then the only defendant in the case, for \$10,000. From this judgment that company has appealed.

The uncontroverted facts are that appellant, the Illinois Central Railroad Company, own six railroad tracks in the City of Chicago that cross 111th street at almost right angles, numbered for convenience from one to six respectively, number one being the most westerly and number six the most easterly of the tracks; that at this crossing appellant had constructed and then maintained two gates, one on the west side and one on the east side of these tracks, that were to be closed down when trains on any of its tracks were approaching 111th street; that it employed a flagman or gateman to operate these gates; that the Michigan Central Railroad Company, through some arrangement between it and appellant, was permitted to use certain of these railroad tracks to run its trains upon;



that on May 11, 1910, a Michigan Central train was approaching this crossing at 111th street on the tracks of appellant; that about the same time appellee's intestate approached these tracks on 111th street at a rapid gait intending to cross them for the purpose of taking a north bound train of appellant then standing at a platform between tracks one and two and north of 111th street; that the gates were not lowered; that the watchman was not at his post, but had left it to assist some ladies in crossing the tracks; that he had seen the train approaching before he left his post to assist the ladies; that the deceased either did not see or did not heed the approaching train and was struck by it as he was attempting to cross the track upon which it was running and was killed.

The first point urged by counsel for appellant is, as expressed by them, that "judgment against appellant alone was improperly entered under the declaration, which did not charge any act on the part of appellant as being alone sufficient to cause the injury". The argument made in support of that proposition is, as we understand it, that the acts of negligence charged against the two defendants are separate and do not arise from a neglect of a common duty; that the declaration amounts to a charge that distinct acts of the two defendants operating in combination produced the injury; that it is not alleged that the acts of negligence of either defendant, disconnected from the negligent acts of the other, were sufficient to have caused the injury resulting in the death of the deceased.

The authorities cited in support of the foregoing contention are, we think without exception, cases wherein two or more defendants charged with independent but concurring acts of negligence which together would, but separately would not, cause the injury complained of, were parties to the suit at the time final judgment was entered against one of them.



In such cases we have no doubt the rule contended for is correctly applied. In this case, however, appellee elected to dismiss her case as to the Michigan Central Railroad Company and take judgment against appellant alone. This she undoubtedly had a right to do. Fecararo v. Halberg, 346 Ill., 95; Willeke v. Henrotin, 146 Ill. App., 481; Postal Tel. C. Co. v. Likes, 124 Ill. App., 459; Nordhaus v. Vandalia R. R. Co., 147 Ill. App., 374; Pullman's Palace Car Co. v. Fielding, 62 Ill. App., 377.

When the cause was dismissed as to the Michigan Central Railroad Company, the declaration, although not formally amended, stood as if all allegations relating to the negligence of that company had been stricken out. Postal Tel. C. Co. v. Likes, 124 Ill. App., 459, affirmed in 325 Ill., 249; Willeke v. Henrotin, 146 Ill. App., 481. Appellant and appellee were the only parties to the suit when final judgment was entered and they stood to each other, and their respective rights were the same, as if the Michigan Central Railroad Company had never been a party to the suit.

Treating this declaration as amended by striking out all the averments as to the negligence of the Michigan Central Railroad Company, which includes the charge that the injury was caused by joint negligence of the two companies, it charges that appellant owned and operated certain tracks in the city of Chicago that crossed 111th street; that the Michigan Central Railroad Company was permitted to use these tracks; that appellant maintained gates at the crossing of its tracks and 111th street to be lowered when any trains on these tracks were approaching that crossing; that it employed a gateman and stationed him at this crossing whose duty it was to lower the gates when trains were so approaching; that when the gates were down they obstructed travel on said street across said tracks and constituted a warning that a train was





approaching and were placed and maintained there for that purpose; that when they were up they indicated that no train was approaching; that on the day in question the Michigan Central Railroad Company ran a train on said tracks of appellant over and across said crossing; that at the time said train was approaching said crossing the gates were not lowered, but were negligently allowed to remain up, and thereby indicated to appellee's intestate, who was then approaching said crossing on said street for the purpose of crossing said tracks there, that no train was approaching and that said intestate, while exercising due care for his own safety, started to cross said tracks at said crossing and was struck by said train and killed. So amended, the concluding sentence of this averment reads: "So the plaintiff says that by reason of the negligence of the defendant, the Illinois Central Railroad Company, her intestate was then and there thereby killed."

So amended, and it must be construed as being so amended, the declaration undoubtedly states a cause of action against appellant alone. It is not the negligent operation of the train of the lessee company, but appellant's own negligence in failing to close the gates as that train approached that is the basis of this action.

It is next contended that instruction No. 22, which was given at the request of the Michigan Central Railroad Company, is erroneous in that it assumes that the death of appellee's intestate was the proximate result of negligence; that it is based on the theory that there could be a recovery against one defendant and not against the other, and that it is misleading.

It is not reversible error to give a faulty instruction when other instructions given at the instance of the complaining party are faulty for the same reason. If this instruction was given on the theory that a recovery could be had



against one defendant alone, as appellant contends, but which as do not think appears from the instruction, it can not avail appellant, for in instructions 1, 2 and 4, given at its request, the same theory is adopted. Neither is it conceivable in what manner it could have misled the jury.

Even if this instruction were faulty for all the reasons urged against it, and the defendant were otherwise in a position to avail itself of the error, the fact that it was asked for and given at the instance of the co-defendant of appellant is enough to prevent a reversal of the judgment for the error in giving it. One defendant can not avail himself of an error that his co-defendant has led the court into.

Cummins, admr., v. Sanitary Dist., \_\_\_\_\_ Ill. App., \_\_\_\_\_, (No. 12840), wherein certiorari was denied by the Supreme Court.

The first instruction given at the request of appellee is criticised. This instruction undertakes to define the degree of care which appellant owed to persons crossing the railroad tracks on 111th street and to point out what the jury might take into consideration in determining whether it had performed that duty. The fault found with the instruction

is that "it would seem to be an intimation by the court that particular care should be given to persons crossing the tracks there for the purpose of going to appellant's station". The instruction correctly states the law and is not subject to the objection made.

Instructions number 24, 25 and 26, requested by appellant, were properly refused.

Refused instruction No. 24 reads as follows:

"The court instructs the jury that it is the law that positive, affirmative evidence has greater weight than uncertain and negative evidence. Applying this rule of law to this case, some of the witnesses for the plaintiff have testified that they did not hear the bell on the train rung and that they did not hear the whistle sounded. Some of the witnesses called by the defendants have testified that the

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bell was rung and that the whistle was sounded. As heretofore stated you should give greater weight to the positive and certain evidence, if you find the same is worthy of belief, than you do to the uncertain and negative testimony of the witnesses who testified that they did not hear the bell rung nor the whistle sounded."

It was not for the court by instruction to characterize the testimony of appellant's witnesses as "the positive and certain evidence" or that of appellee's witnesses as "uncertain". Either affirmative or negative evidence may be positive and certain or it may not be so, but it is for the jury and not the court to say whether it is certain or not. Refused instruction No. 35 undertakes to define the duty of the deceased in regard to looking for the approaching train and entirely ignores the fact that the gates that were placed there to be shut down when a train was approaching were up, thereby announcing to the deceased that no train was approaching and that it was safe for him to cross. Refused instruction No. 36 announced the law to be that if the deceased by the exercise of ordinary care for his own safety could have seen the approaching train "in time to have prevented the accident", then the plaintiff could not recover. If that clause of the instruction had read, "in time to have prevented the accident by the exercise of ordinary care", it would have been more nearly accurate. If the law were as stated in this instruction, if the deceased could, by the exercise of ordinary care, have seen the train in time to have prevented the accident by any means however extraordinary, he could not recover. Of course, that is not the law.

The jury were instructed on all the questions sought to be covered by refused instructions number 23 and 26 fully as favorably as the law would warrant, and even if these refused instructions had been accurately worded, their refusal would not have been reversible error. One correct instruction on



any given proposition of law is all that any litigant has a right to demand.

It is next urged that the cause of the death of the deceased was his own contributory negligence. That question was submitted to the jury and they found adversely to the contention of appellant. By their verdict they in effect found that the deceased exercised such care and caution for his own safety at and just before the time he was killed as an ordinarily careful and prudent person would have exercised under the same or similar circumstances. The evidence shows that the deceased was and had been for some time working at the Pullman shops near the crossing where he was killed; that to go from his work to his home, he traveled on a suburban train of appellant; that this train was due to start from a platform located between the two most westerly tracks of appellant there, and just a little north of 111th street, at 5:35 P. M.; that the shops where deceased was working shut down at 5:30 P. M.; that when the shops shut down about 12,000 men swarmed out; that many of them, including the deceased, hurried across appellant's tracks at 111th street to take the 5:35 train to the city; that appellant maintained crossing gates on both the east and west side of its tracks and employed a crossing flagman whose duty and general custom was to close or shut down the crossing gates whenever a train was approaching that crossing; that on the night in question the 5:35 train for down town was standing on appellant's second track from the west at the platform above described, when the men came from the shops; that the crossing gates were not shut down and the crowd rushed across the tracks there; that appellant was in the crowd and going rapidly; that a Michigan Central train was approaching; that the deceased was struck by it and killed and that several other persons narrowly escaped being struck by it. When crossing gates are maintained at the inter-





section of railway tracks and streets, particularly where large numbers of persons are in the habit of passing, and are left up, the fact that they are so left up amounts to an invitation to cross the tracks and to notice that no train is approaching and that it is safe to cross. Standard Brewing Co. v. Erie R. R. Co., 167 Ill. App., 302; C. & E. I. R. R. Co. v. Olson, 113 Ill. App., 300; C. & E. I. R. R. Co. v. Schmitz, 211 Ill., 446; C. & E. I. R. R. Co. v. Zapp, 110 Ill. App., 553; Rosenthal v. C. & A. R. R. Co., 164 Ill. App., 221; C. & A. R. R. Co. v. Redmond, 70 Ill. App., 119. A careful consideration of all these circumstances impels the conviction that the verdict of the jury is right, both as to the question of the contributory negligence of the deceased and the negligence of appellant, or at least that it is not so manifestly wrong as to warrant us in setting it aside.

It is not denied that appellant owned and maintained the crossing gates in question, or that the gatesman who had charge of them was its servant, or that the gatesman knowing the Michigan Central train was approaching and that numerous persons from the shops were about to cross the tracks at that crossing, abandoned his post in the tower maintained by appellant for his use and left the gates open. Leaving those gates open under such circumstances was certainly gross negligence. It is said by counsel for appellant that the abandonment by the flagman of his post in the flagman's tower and leaving the gates up is excused by the fact that he went down to assist some ladies, who ignored the warning of the flagman's bell to cross the tracks in safety. If he had closed the gates before abandoning his tower, appellee's intestate would likely not have been injured. It was by leaving the gates open that the flagman made his mistake. To our minds the purpose the flagman had in leaving his post is no excuse for not lowering the gates.



Appellant has assigned for error that the verdict and judgment are excessive, but as that assignment has not been mentioned in its brief, it will not be considered.

Finding no reversible error, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

The first part of the paper is devoted to the study of the  
 properties of the function  $f(x)$  defined by the equation  

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $f(x)$  is an odd function and  
 that  $f(x) \in C^1(\mathbb{R})$ . The second part of the paper is devoted  
 to the study of the function  $g(x)$  defined by the equation  

$$g(x) = \int_0^x \frac{t}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $g(x)$  is an even function and  
 that  $g(x) \in C^1(\mathbb{R})$ . The third part of the paper is devoted  
 to the study of the function  $h(x)$  defined by the equation  

$$h(x) = \int_0^x \frac{t^2}{1+t^2} dt$$
 for  $x \in \mathbb{R}$ . It is shown that  $h(x)$  is an even function and  
 that  $h(x) \in C^1(\mathbb{R})$ .

March Term, 1913, No.

30 - 19036.

THE CITY OF CHICAGO,  
Defendant in Error,  
vs.  
DANIEL BARANOV,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

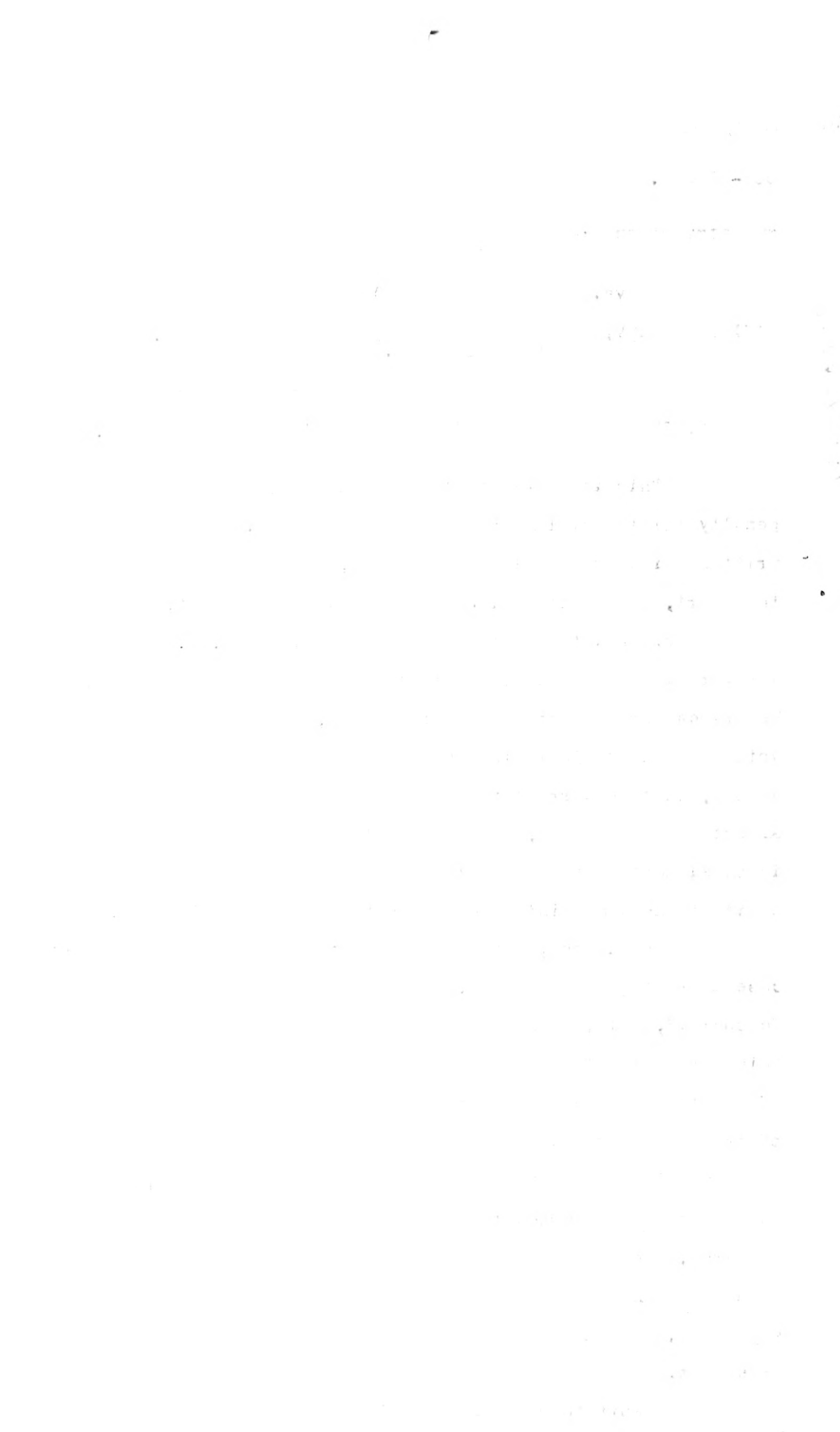
189 I.A. 25

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

This is a suit in the Municipal Court to recover a penalty for the violation of a city ordinance. There was a written waiver of trial by jury filed, the cause was heard by the court, a fine of \$35.00 was imposed on defendant, and he was also ordered to pay the costs assessed at \$6.00. He asks a reversal on alleged errors in the common law record alone. He argues three questions only: First, that the judgment is void for want of jurisdiction of the person of the defendant; second, that to warrant the issue of *respondeat* process for the arrest of a defendant, the complaint upon which such process is based must definitely set forth the offense which is the basis of the complaint; third, that the judgment is void. -

No summons, capias or warrant was ever issued in this case against this defendant. He was brought into court on October 17, 1912, without a warrant. On complaint in writing being presented to the court charging him with the violation of a city ordinance he entered his appearance, filed a waiver of trial by jury and moved the court for a postponement of his trial until October 30, 1912, which motion was allowed, and the cause was adjourned to that date. On that date the parties appeared, the cause was tried and the defendant found guilty. Nowhere in the proceedings, so far as appears by the record presented, are any question raised as to jurisdiction of the defendant.

A suit to recover a penalty for the violation of a



city ordinance is a civil suit, and the rules applicable to criminal proceedings do not apply. Where a complaint is made, a warrant issued and the defendant is brought into court on such warrant, the procedure thereafter is purely civil in its character, and is not different than if commenced by summons. City of Chicago v. Williams, 254 Ill., 360. In a civil suit a defendant may enter his appearance and thereby waive the issuance and service of summons, or other process. When he does so, the court has jurisdiction of the person as effectually as could be acquired by service of any legal process. Having entered his appearance in that case and participated in the trial of the merits of the charge, it is too late for him now and here to challenge the jurisdiction of the court over him.

Whether the complaint was definite enough to authorize the issuance of a warrant is, under the facts in this case, wholly immaterial. No warrant was issued and the defendant, as already stated, waived the necessity of the issuance of one. After a defendant is once in court the complaint, if one has been made, may stand as a statement of the plaintiff's claim, and if it is not definite enough to suit the defendant, he should move for a rule on plaintiff to file a more specific statement, as in other cases of the fourth and fifth class under the Municipal Court Act. City of Chicago v. Williams, 254 Ill., 360.

The objection that the judgment is void is based on the statement of counsel that the finding of the court is that the defendant is guilty of violating the ordinance described in the complaint, and that there is no ordinance described in the complaint. In this statement counsel is clearly in error. The ordinance the defendant is charged with violating is described in the complaint by the number of the section of the Municipal Code. The acts he is charged with doing which are





said to be in violation of the Municipal Code are also specifically set forth in the complaint.

No error is apparent from the record presented here and the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

1. The first part of the paper is devoted to a discussion of the various methods of determining the rate of reaction. The second part is devoted to a discussion of the various methods of determining the order of reaction. The third part is devoted to a discussion of the various methods of determining the activation energy of a reaction.

March Term, 1908,  
93 - 19088.

FITZ G. H. KREAMER,  
Plaintiff in Error,  
vs.  
C. M. HETITT,  
Defendant in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

191 A. 27

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, who was the plaintiff in the Municipal Court, claims that he offered to do certain work and furnish certain materials in connection with certain remodeling and repairs that defendant was contemplating on his house, for the total sum of \$79; that defendant in error accepted the offer and that, thereupon, he, plaintiff in error, did the work and furnished the materials proposed.

In his statement of claim he says that the proposal or offer was in writing, but he does not state whether he claims it was accepted by an instrument in writing or by word of mouth, in person, or through an agent. Defendant in error in his affidavit of veritorious defense denies that he made any contract with plaintiff in error, as alleged by him; denies that he accepted the proposition of plaintiff in error; denies that the work was performed or that the materials were furnished by plaintiff in error for him and denies that he owes plaintiff in error the \$79 claimed. An offer in writing addressed to defendant in error, substantially as alleged in the statement of claim, was introduced in evidence. In an effort to prove that defendant in error accepted the offer a letter supposed to have been written by him to a third person by the name of Long was offered in evidence. The offer was objected to and the letter was excluded on the ground that it had not been properly identified as the letter of defendant in error. No proof was offered that he had



written or authorized the writing of it, or that he knew of its existence. No other evidence of the acceptance of the proposal was offered.

In order to establish the contract sued on the burden of proving the acceptance, as well as the offer, was on plaintiff in error. Failing to make that proof, the court properly found the issues for the defendant and entered judgment accordingly.

Besides, the fact that plaintiff in error failed to prove that defendant in error accepted the offer, the proof offered by plaintiff in error very strongly tends to show the facts to be that defendant in error contracted with one Long to do the work in question, to either with other work, and to pay him therefor whatever the work and materials therefor should cost him and in addition thereto 15% on that amount for his profit, and that Long sub-contracted to plaintiff in error the part of the job which he in his letter to defendant in error offered to do for \$79, and that it was under this contract between him and Long that he did the work and furnished the materials.

The judgment entered by the court was correct under the facts presented by this record and the same is affirmed.

JUDGMENT AFFIRMED.



March Term, 1913, No.  
172 - 19173.

WILLIAM DOBBS,  
Defendant in Error,  
vs.  
LEOPOLD ZEMAN and ISAAC D. ZEMAN,  
Plaintiffs in Error.

FROM TO  
MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 28

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

The only errors argued as a ground of reversal of the judgment in this case involve the construction and application of the rules of the Municipal Court. These rules are not preserved in the record.

Section 20 of the Municipal Court Act, in so far as it requires that "the Supreme Court and the Appellate Court, in cases brought to them from the Municipal Court, by appeal or writ of error, shall take judicial notice of the rules of practice from time to time in force in said Municipal Court", has been held unconstitutional. Sixby v. Chicago City Ry. Co., 280 Ill., 478-481.

When a determination of the only alleged errors complained of involves a consideration by this court of the rules of the Municipal Court, such rules must be in some way preserved in the record presented here, and if they are not so preserved, the judgment of the Municipal Court will be affirmed.

The judgment of the Municipal Court is, therefore, affirmed. The cost of the additional abstract will be taxed to plaintiffs in error.

JUDGMENT AFFIRMED.





March Term, 1913, No.

337 - 19351.

THE PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. ANNA BETSCHING,

Appellse,

vs.

PHILLIP WAIBEL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 30

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellant was found guilty by a jury in the Municipal Court of being the father of the bastard child of Anna Betsching, the prosecuting witness in this case. Upon that verdict a judgment was duly entered against him in conformity with section eight of Chapter seventeen of the Revised Statutes of Illinois.

Appellant first contends that he was unduly restricted in his cross examination of the witness, Anna Betsching. Her testimony on direct examination was very brief. The entire abstract of her testimony is as follows:

"ANNA BETSCHING, relatrix:

"Twenty-five years old. Lived at Rigi hotel, March, April and May, 1911, Adams and Clinton streets. Was a chamber maid there. Had intercourse with defendant in March, April and May, 1912, at Rigi hotel.

"Had intercourse first time in my room on 7th March, in year 1912. Am not positive if the intercourse after that was on the 16th of March or some other date. Cannot remember how many times had intercourse after the 7th of March. Came to the hotel in 1911. It was in 1912 I had intercourse with him. I stayed in bed with him.

"I came there in September, 1911, and did not have anything to do with him until 1912. Had to do with him once on March 7, 1912. Have never had intercourse before with any other man. Boy born December 4, 1912. Happened in Chicago."

The abstract shows four questions only to which objections were sustained. These questions were as follows:

"Do you remember any conversation you ever had with the defendant prior to March 7, 1912?"

"Didn't I ask you when you expected the child to be



born and didn't you reply, November 13, 1918?"

"Didn't I visit you at the hotel in November, with another gentleman, and ask you some questions there - 18th December?"

"Didn't I ask you on that occasion when was the first intercourse with Phillip Weibel, in the presence of this other gentleman, and didn't you make this reply, 'that it was the Sunday after the grandmother died'?"

The reason given by appellant why the ruling as to the first question quoted above was error is that it "prevented a cross examination of her regarding any acts she may have committed prior to March 7th, and still be within the usual period of gestation, and which could have resulted in her pregnancy."

Now the question asked could have elicited a reply that would have shown any act that could have resulted in the pregnancy of the witness is inconceivable.

The other three questions were asked as counsel now claims for the purpose of laying a foundation for impeachment. Now any answer that could have been made to them would have opened the door for impeaching testimony is not suggested by counsel, and is not apparent. Besides that, the record shows that the witness was an Austrian girl who could speak no English and that the examiner in all the conversations he ever had with the witness used the English language which was interpreted to the witness. It was, therefore, impossible for the witness to know of her own knowledge what questions were asked by counsel. The most she could possibly know about it would be what questions the interpreter put to her. The court called counsel's attention to that situation, but he seemingly did not profit by the suggestion. There was no error in the rulings of the court on objections to cross questions put to the witness.

Appellant next argues "that the judgment is against the weight of the evidence", and assigns two reasons for so



thinking, first, that the child was born before the expiration of the full period of gestation, counting from the first act of sexual intercourse; and, second, that appellant followed the example of Onan, the second son of Judah, who in his relations with his brother's widow, "spilled it on the ground". (See Genesis, 38:9).

The evidence shows that the child was born December 4, 1912. The full period of gestation is 280 days, or nine calendar months and ten days. If this child made its unwelcome advent in exactly schedule time, then conception took place on the last day of February, 1912. The first act of sexual intercourse testified to by the prosecuting witness occurred on March 7, 1912, while appellant says it was on "St. Patrick's day in the morning", between eight and nine o'clock. If the mother is right in her dates, the child came one week ahead of time. If appellant is correct, the birth was premature by two weeks and three days. It is a matter of common knowledge that greater variations in time than seventeen days between the theoretical and the actual period of gestation are not infrequent. It follows that whether the jury believed conception took place on the 7th, the 17th, or even a later day in March, 1912, the fact that the birth occurred on December 4, 1912, would not be sufficient to cast a doubt on the correctness of the finding of the jury that appellant was the father of the child, particularly when the uncontradicted evidence shows that the mother never had intercourse with any other person than appellant.

The expedient resorted to by Onan resulted disastrously to him and has been practiced with varying degrees of calamity from his time down to that of appellant, and has never, so far as we know, received judicial sanction as a defense to a charge of bastardy. No authority has been cited where either a court or a law writer has regarded the opinion of the male



that he succeeded in withdrawing before emission, as more liable to be correct than the opinion of the twelve good men and true in the jury box, all over twenty-one years of age, that he was too slow about it. The fact already cited that the uncontradicted evidence is that the mother of the child never had sexual intercourse with any other man than appellant undoubtedly also had influence with the jury in reaching their verdict. We think the verdict of the jury was fully warranted by the evidence.

It is next contended that the court committed error in instructing the jury regarding the amount of money appellant would be compelled to pay the mother of the child, if they found him guilty. It was not a matter with which the jury were concerned, and should not have been given, but we are unable to see how appellant could have been harmed by it. In People v. Welch, 143 Ill. App., 191, a similar instruction was held to be erroneous and the judgment was reversed, but there were in that case several other glaring errors and the court did not say that the instruction complained of would alone have warranted a reversal of that judgment.

Appellant next says: "The court committed serious error in instructing the jury in response to a question submitted to the court by one of the jurors that under the law if the child dies before the five hundred and fifty dollars is paid, the appellant can make this showing and stop the payments". The main trouble with that contention is that it is not true that the court so instructed the jury in response to a question by a juror. The record shows what occurred to be as follows: When the court had finished the instructions with the exception of the instruction as to the form of the verdict, he said to counsel, "Anything else, gentlemen?" To this inquiry the attorney for appellant said, "If the court





please, would like an instruction that the law imposes the duty on the prosecution, by a preponderance of the evidence, that the child was born alive and is alive." The court made no immediate response to this remark of counsel, but gave the jury instructions as to the form of their verdict. Then a juror said, "We would like to know whether the child was born alive or is alive or not". To this inquiry of the juror the court replied, "Well, you heard the evidence in the case". Then the attorney for appellant said, "I ask for an instruction to show whether the child was born alive and is alive". The court then apparently in response to the request of counsel, said, "Under the law if at any time after the child is born, the child dies before the \$550 is paid the defendant can then come into court and show that fact by proper certificate, and as soon as he so shows, the payments stop". Whether the subject under discussion was a proper or an improper one for the consideration of the jury, and whether or not what was said by the court was intended as an instruction to the jury, or a reply to the request of counsel, it was clearly called out by such request, does not mis-state the law and could have done appellant no harm.

It is lastly contended that the court erred in refusing to give several written instructions asked for by appellant. The court instructed the jury orally. It has been held that when a judge of the Municipal Court determines to instruct the jury orally and does so, it is not error to refuse to give written instructions requested by counsel for the parties. Morton v. Pusey, 237 Ill., 26-35; Lerman v. Employers L. A. C., 170 Ill. App., 379-383.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.



October Term, 1905

53 - 19438.

MARGARET C. B. JOHNSON,  
Plaintiff in Error,

vs.

CITY OF CHICAGO,  
Defendant in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

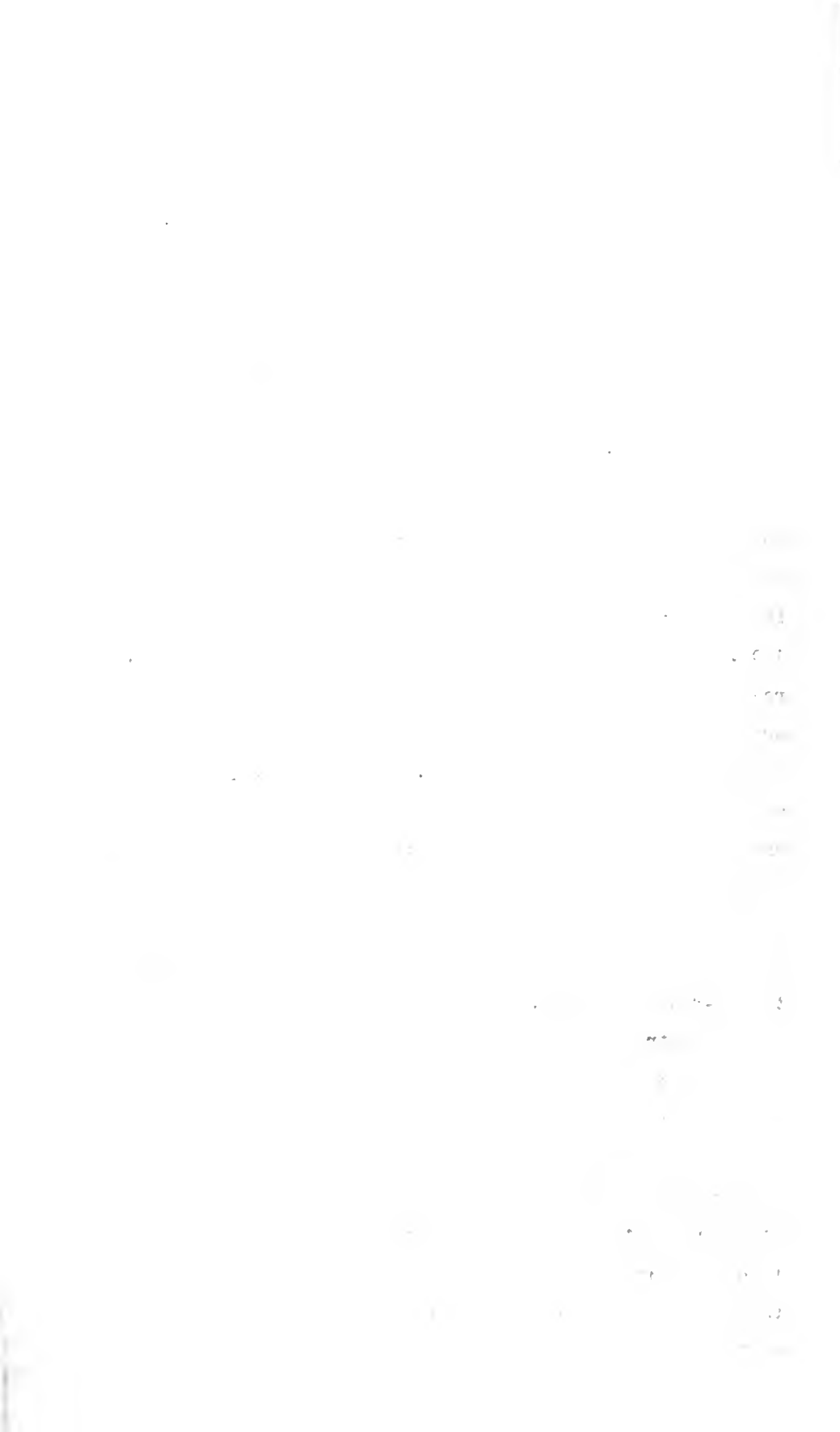
189 I.A. 32

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

On October 4, 1905, the plaintiff in error brought suit against the City of Chicago for damages for personal injuries alleged to have been caused by stepping into a hole in the pavement of a public street in Chicago on October 5, 1903. The suit was tried in November and December, 1909, and resulted in a verdict of not guilty. On March 26, 1910, a motion for a new trial was overruled and judgment was entered against the plaintiff for costs. On March 26, 1913, this writ of error was sued out to reverse that judgment. The only errors complained of are errors in the giving and refusal of instructions, and in placing a limit of thirty-two upon the number of witnesses called in rebuttal to testify to the good reputation of the plaintiff for truth and veracity, after twenty-four witnesses, called by the defendant, had testified to the contrary.

The bill of exceptions does not purport to contain all the evidence. A part of the evidence on both sides is stated in narrative form, and here and there questions and answers are given; but the bill also states that other evidence "to maintain the issues" was introduced by both sides, "which is not herein set forth." The rule in this State seems to be that "where legal questions alone, such as the giving or refusal of instructions, are intended to be raised on appeal or writ of



error, it is proper for the bill of exceptions to state that the evidence tended to prove the facts upon which it is contended the giving or refusal of the instructions was improper." (Costly v. McGowan, 174 Ill. 76, 79.) In Schmidt v. Chicago & Northwestern Ry. Co., 83 Ill. 405, 412, the practical effect of this rule was stated as follows: "It is only where the evidence is all preserved in the record, and we can see from it that the jury could have reached no other conclusion than they did, had the instructions and all of the rulings been correct, that we will affirm notwithstanding error may have been committed in giving or refusing instructions. In this case the bill of exceptions shows that the evidence was inharmonious. As only legal questions arising on the record are presented, we cannot presume the finding was right in despite of the errors committed by the court on the trial of the case." To the same effect is the case of Sears, Roebuck & Co. v. Winchester R. A. Co., 178 Ill. App. 318. It follows from these decisions that where a bill of exceptions is found in the record like the one in this case, the doctrine of "harmless error" - which has saved so many judgments from purely technical attack, where it was shown that substantial justice has been done - cannot be applied; for in such cases, if an instruction, or a ruling, is manifestly wrong, the error must be assumed to be harmful.

One of the instructions given in this case on behalf of the defendant was as follows: "The court instructs the jury that there is no presumption of negligence against the defendant, City of Chicago, from the simple fact that the plaintiff was injured upon a public street, if the jury believe from the evidence that the plaintiff was injured on a public street." In West Chicago St. Ry. Co. v. Petters, 193 Ill. 298, an instruction similar to this was condemned, in the following terms (p. 300): "This class of



instructions, which select one item of evidence, or one fact disclosed by the evidence, and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse a jury. The case of Drainage Comrs. v. Illinois Central Railroad Co., 158 Ill. 355, was reversed on this character of instructions." This language was reaffirmed in Chicago City Ry. Co. v. Lowitz, 218 Ill. 24. In a number of other cases, it was held that it is not error to refuse an instruction of this kind. Hoge v. The People, 117 Ill. 35, 46; Clark, et al. v. The People, 224 Ill. 554, 564; Weston v. Teufel, et al., 213 Ill. 291, 300; Eckels v. Muttschall, 230 Ill. 462, 468; The People v. Pezutte, 255 Ill. 583, 591; Hoffman v. Tosetti Brewing Co., 257 Ill. 185, 191. In some of these cases statements will be found to the effect that the giving of such an instruction will not of itself be held to be prejudicial or reversible error in any case in which the court, after an examination of all the evidence, can see that no prejudice has, in fact, resulted therefrom. But in this case, the bill of exceptions does not contain all the evidence, and therefore we have no means of knowing whether the giving of the instruction was prejudicial or not. Under the decisions above cited, and particularly the cases in 174 Ill. and 178 Ill. App., it was the duty of the defendant in error to have insisted upon a bill of exceptions containing all the evidence, if it desired this court to examine the same for the purpose of ascertaining whether the errors complained of were harmless under the facts of this case. That duty was not performed, and we are therefore constrained to hold that the error indicated was prejudicial to the plaintiff.

Several other instructions are also complained of. Without quoting these instructions, we deem it sufficient to say





that we think the twenty-fifth, the thirty-third and the thirty-fifth instructions should not have been given. They are misleading, involved and, in some respects, inaccurate. The thirty-third, in particular, is clearly erroneous, if the phrase "for which the respective portions thereof are designated" was intended to have the meaning stated in the last two refused instructions offered by the defendant in error.

We think there was no error, prejudicial to the plaintiff, in limiting the number of impeaching witnesses. The trial court has, under the law, a reasonable discretion in fixing a limit upon the number of witnesses who are called for purposes of impeachment. Doner v. The People, 92 Ill. App. 43; West Skokie Drain Dist. v. Dawson, 243 Ill. 175, 180; People v. Arnold, 248 Ill. 139, 178. There is nothing in the record before us to show that the trial court abused its discretion in this respect.

For the errors indicated, the judgment of the Circuit Court of Cook County will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



October Term, 1915  
73 - 19455.

SAMUEL WOLFPORT,  
Defendant in Error,

vs.

DAVID LIPSEY COMPANY, DAVID  
LIPSEY and ETHEL LIPSEY,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 34

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out to reverse a judgment of the Municipal Court entered against the defendants by default for want of a sufficient affidavit of merits. The plaintiff's statement of claim is "for the sum of \$125.00 laid out and expended for said defendants at their request as follows, on, to-wit: August 14, 1912, plaintiff paid to the firm of Sabath, Levinson & Stafford for and on account of said defendants the sum of \$25.00 and on, to-wit: September 30th, 1912, plaintiff paid to said Sabath, Levinson & Stafford the further sum of \$100.00 for said defendants, in all \$125.00, which plaintiff paid said firm for said defendants at their special request and for their benefit, which said sums said defendants promised to return to plaintiff and there is due to him from them the sum of \$125.00 with interest at 5%, in all the sum of \$127.25." To this statement is appended an affidavit stating "that the nature of plaintiff's demand is as above set forth." Upon the return day, the defendants entered their appearance in writing and were given ten days within which to file an affidavit of merits. Within such <sup>ten days, they filed an affidavit of one Cohen, who says "that he is the agent for the defendants;" that "he verily believes that said defendants, and each of them, have a good defense to the whole of the plaintiff's claim, and that the nature of such defense is as follows: \* \* \*</sup>

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"5. That these defendants, or either of them, have never promised to pay to the plaintiff any part of said \$125.00."

"6. That said sum of \$125.00 was never laid out or expended for these defendants, or either of them, at their, or either of their, request."

This affidavit was stricken from the files, as well as several others to the same effect, filed later. The judgment by default followed.

No rule of the Municipal Court is incorporated in the transcript of the record, as certified to this court. This court cannot take judicial notice of the rules of that court. (Sixby v. Chicago City Ry. Co., 260 Ill. 478.) This being true, we must assume, on this record, that section 55 of the Practice Act controls. That section permits a judgment by default for want of a sufficient affidavit of merits when, and only when, the plaintiff "shall file with his declaration an affidavit showing the nature of his demand." This requirement is just as specific and as broad, as the requirement that the defendants affidavit of merits shall specify "the nature of such (his) defense." If, therefore, the plaintiff's affidavit, showing "the nature of his demand," consists merely, as in this case, of the common count in assumpsit for moneys laid out and expended by the plaintiff for the use of defendants at their request, and a promise to repay the same on demand, it manifestly follows that an affidavit of merits which specifically asserts that no moneys were so laid out and expended and that no such promise was ever made, states a complete defense upon the merits, and also "the nature of such defense." The affidavit of Cohen specifically denies each of the averments of fact contained in the plaintiff's statement of claim. This denial presented a clear issue of fact upon the claim as stated by the plaintiff. The statute permits such an affidavit to be filed either by the defendant, "or his agent or attorney." In our opinion, the affidavit of Cohen was clearly



sufficient, and it was error for the court to strike it from the files and enter judgment by default.

It is suggested by counsel for defendant in error that there is a rule in the Municipal Court to the effect that a mere denial will not be regarded as a sufficient affidavit of merits. We cannot assume this to be true, in the absence of a bill of exceptions showing such to be the fact. But we may properly say that if there is any such rule in that court, it can have no reasonable application to the facts of this case, or any similar case in which the "nature of the defense" shown by the affidavit of merits is a complete and specific denial of all the facts alleged in the plaintiff's affidavit of claim.

For the reasons stated, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.





103 - 19489.

HUGO FRITSON,  
Defendant in Error,

vs.

HENRY JUNIUS, OTTO KLEKER and  
MRS. OTTO KLEKER,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 36

MR. PRESIDING JUSTICE RITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff sued the defendants in the Municipal Court and recovered a judgment against them for \$300. We have been unable, after reading the entire record and the briefs of counsel, to discover any theory upon which the judgment can be affirmed. The plaintiff's amended statement of claim states, in substance, that on June 23, 1912, Henry Junius, one of the defendants, requested the plaintiff to make an estimate of the cost of doing certain iron work on a building owned by the other two defendants, Otto Kleker and Mrs. Otto Kleker; that plaintiff gave Junius such an estimate, in the form of a letter addressed to Junius, offering to do the work for \$288.50; that such estimate was accepted by Junius, and the plaintiff was requested to do the work, which "the plaintiff proceeded to perform" but was unable to complete "by reason of discontinuance of building operations on the building;" that he furnished materials and labor "of the reasonable value and agreed price of \$250;" that the owners of the building never paid Junius for the same, "nor received from him any affidavit in regard to sub-contractors as provided by law." The defendants denied under oath all liability either joint or several. Upon the trial, before the court without a jury, plaintiff's counsel stated that he did not claim any right to recover under the Mechanic's Lien Act, but insisted that all three



defendants were liable "upon a direct contract between all these parties." There is no evidence in the record tending to show any such joint contract, and the evidence wholly fails to show any joint liability under the Mechanic's Lien Act. It appears from the evidence that a construction company was engaged in erecting a building for Mr. and Mrs. Kleker. The defendant, Henry Junius, was a carpenter in the employ of the construction company, and his son, William Junius, was the superintendent for the construction company. The father and son lived in the same house. About the middle of June, 1912, the superintendent requested his father to ask the plaintiff to submit a bid for some iron work on Kleker's building. The father did so and the plaintiff went to the Junius house, examined the plans and specifications in the possession of William Junius, and gave him a written estimate, addressed to Henry Junius. William Junius told him to go ahead with the work. Junius testified that he also told him, at the same time, to change the name in the estimate, and send it to the construction company, that the work was not to be done for him (Junius), but for the construction company. Plaintiff denied that Junius said anything about the construction company until after he had done his work. The plaintiff testified that he was introduced by William Junius to Otto Kleker as "the iron contractor," that the latter asked him how long it would take to do his work; that he replied "five or six days" and that Kleker then said; "All right," or "Go ahead and do it as quick as you can." The plaintiff furnished some of the iron according to his estimate, but just how much, or what the value of it was, does not appear. The construction company quit work on the building on July 1st, 1912, and the building was finished by another contractor. There is no evidence whatever tending to prove that Henry Junius had any other connection with the matter than as above stated. No



contract of any kind between him and the Klekers was shown, nor, so far as the evidence discloses, had he any interest in the building or the construction thereof aside from the wages he was earning as a carpenter employed by the construction company. If, by any strained view of the evidence, he could be regarded as an agent of the Klekers, they alone would be liable. There was no joint liability, in any sense. Henry Junius made no contract with the plaintiff. He made no promise of any kind, nor did he receive any benefit whatever from the doing of the work or the furnishing of materials by the plaintiff. The finding and judgment against Junius is clearly erroneous, and this being true, it is erroneous in toto. (Clafflin v. Dunne, 129 Ill. 241.

A motion was heretofore made to strike the statement of facts, or stenographic report, from the record upon the ground that it does not comply with paragraph 6 of section 23 of the Municipal Court Act. While the certificate of the trial judge is not in the exact language of the statute, it does state, over the signature of the trial judge, that it is "a full, true and correct statement of all the facts and evidence introduced or offered by either or any of the parties in the above entitled cause, and all questions of law involved in the case, and of all the proceedings had before me in said cause." The document to which this certificate is appended is in the form of a stenographic report of the proceedings at the trial. It is certified to contain all the evidence. It shows on its face the objections made and the rulings of the court thereon. To this is attached a statement of the rulings of the court upon the several motions made before and after the finding for the plaintiff, and the propositions of law marked "held" and "refused." We think this is a substantial compliance with the statute. Within thirty days after

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the judgment was rendered, an order was entered extending the time within which to file a stenographic report for thirty days. This order was not entered by the trial judge, but by another judge of the same court. The statute requires the statement of facts, or stenographic report, to be presented to, and signed by, the trial judge, but permits this to be done either within thirty days after the entry of the judgment, "or within such further time as may, upon application therefor within said thirty days, be allowed by the court." In our opinion, this means that any judge of the court may enter an order extending the time to present such a statement or report to the trial judge. The motion to strike is therefore denied.

For the reasons stated, the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.





ANHEUSER-BUSCH BREWING ASSO-  
CIATION, a Corporation,  
Plaintiff in Error.

vs.

FREDERICK KALTROFF,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

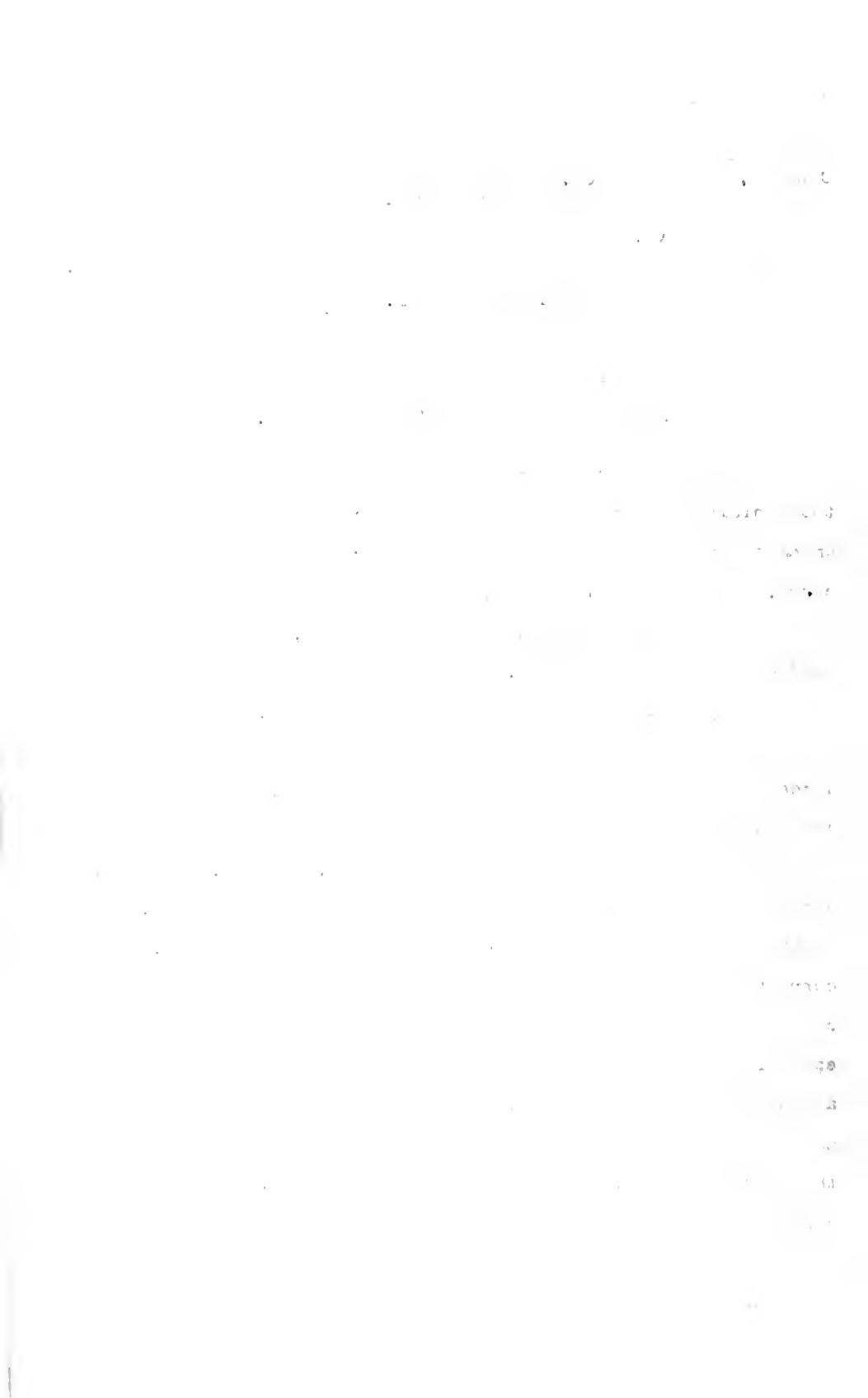
129 I.A. 38

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error sued the defendant in error in the Municipal Court to recover the amount alleged to be due under the terms of a written contract between the parties. That court, sitting without a jury, found in favor of the defendant, and from a judgment entered upon that finding, the plaintiff has sued out this writ of error.

By the terms of the contract in question, the Brewing Association agrees to sell and deliver to Kalthoff, and Kalthoff agrees to purchase from the Brewing Association, "all the domestic draught beer needed and required" by him "for use and sale upon the premises known as 162 East Adams Street, Chicago, Illinois," during the period of five years from and after May 1, 1909, and Kalthoff agrees to pay for the same in cash upon delivery, at the current market price of the Association for such beer at the time of such delivery; that the Brewing Association shall pay three specified bills of Kalthoff's aggregating \$1,325, one for painting and decorating the premises, another for beer and plumbing supplies, and the third for saloon fixtures; that if at any time during the specified term, Kalthoff "shall sell, assign, transfer or convey his interest in the business carried on upon said premises," he shall repay to the Brewing Association a pro rata share of said \$1,325; and that he "shall have the right at any time after



November 1, A.D. 1910, to terminate this agreement" by giving a written notice to that effect "and repaying to said second party such a pro rata share of said sum of One thousand three hundred and twenty-five (\$1325) Dollars as the then unexpired term of this agreement shall bear to the entire term." *It* At the time this agreement was made, Kalthoff was in possession of the Adams street <sup>certain</sup> premises under a lease from Rand, McNally & Co. to him, for a term of five years, beginning <sup>a third party</sup> March 1, 1909, and ending April 30, 1914, in which lease there was a clause reserving to the lessor the right to cancel the same on May 1, 1911, or any time thereafter, by giving the lessee six months' written notice of its intention so to do, and paying him, if so terminated between November 1, 1911, and November 1, 1912, the sum of \$2,000. It was admitted upon the trial that the contract sued upon was drawn by the plaintiff's attorneys, with full knowledge, on their part, of the existence and terms of this lease from Rand, McNally & Co. to Kalthoff. It was also admitted that <sup>the lessor</sup> Rand, McNally & Co. served notice on November 18, 1911, of its intention to cancel the lease, and that on May 18, 1912, Kalthoff "surrendered and delivered up possession of said saloon to <sup>the lessor</sup> said Rand, McNally & Co., who thereupon tore down and removed the building within which the saloon in question was situate." *It* This suit was brought to recover back so much of the \$1,325 paid by the plaintiff as the unexpired term of the contract bears to the whole term of five years. The defendant claimed that there is no provision in the contract which expressly requires him to refund any part of the money thus advanced in case of a destruction of the premises, and that it was the duty of the plaintiff, under the circumstances, to have inserted a clause in the contract to cover that contingency, if it so de- <sup>sired.</sup>

It appears from the propositions of law marked "held" and "refused" that the trial court refused to hold, as requested



by the plaintiff, that under the circumstances stated, the law implies an undertaking on the part of defendant, to maintain and operate a place for the sale of the plaintiff's beer for the full term of five years; and also refused to hold, as a matter of law, that the contract in question requires the defendant to repay to the plaintiff "the unearned portion of the consideration" whenever the defendant became "unwilling or unable to further comply with his obligation to sell plaintiff's goods." In the view that we take of the facts of the case, it will only be necessary for us to consider whether the court erred in refusing the proposition last above mentioned, which is the fifth proposition as printed in the abstract of the record.

The rule is invoked by defendant, and supported by many authorities, that where a contract is plain and unambiguous, it is the duty of the courts to enforce the contract as written and not attempt to read into it, by construction, any agreement or covenant not therein expressed. Conceding this to be a well settled general principle of the law of contracts, it is equally true that the words used in a contract must be given a reasonable interpretation according to the intention of the parties, if such intention can be gathered from the language used. (Wilson v. Marlow, 66 Ill. 385.) "The controlling consideration always is to arrive at the intent of the parties, and in doing this, every part of the instrument is to be considered and properly weighed." (O.B.&Q. R. Co. v. City of Aurora, 99 Ill. 205.) "When the true meaning of a contract is in dispute, the harsh or unreasonable results flowing from one construction should cause the court to search the contract diligently to see if it is capable of some more reasonable construction which the parties really intended." (Loose v. Brunson, 141 Ill. App. 323.)

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Applying these principles to the facts of this case, we find that the contract expressly provides that the plaintiff agrees to sell and deliver, and the defendant agrees to buy and pay for, all of a certain kind of beer that may be needed by him for use and sale in his business at the premises named for a specified period of five years. Such an agreement is not a mere option, but is a binding and enforceable contract. (Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85.) If these were the only provisions in the contract, the contention of the plaintiff that the law would imply therefrom a covenant on the part of the defendant to continue in business for the period of five years might become important, and perhaps necessary for us to decide. In National Furnace Co. v. Keystone Manf. Co., 110 Ill. 427, where the former agreed to deliver to the latter all the iron that the latter "should need, use or consume in its business" for a certain year, the court said: "It is not to be presumed that appellee would close its business and need no iron, but on the contrary, the reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years." In this case, however, it is unnecessary to determine whether a similar presumption would arise from that part, alone, of the contract here in question, for the reason that by other provisions in the contract, the right of the defendant to discontinue the business at any time, and his right to terminate the contract after November 1, 1910, for that or for any other reason, is clearly recognized and the consequences of such a discontinuance are expressly prescribed. The contract provides in terms, that the defendant shall have the right to terminate the agreement at any time after November 1, 1910, by giving notice to appellant and repaying a proportionate share of the money advanced by appellant. It also provides





that if defendant shall sell, assign, transfer, or convey his interest in the business, he shall refund a proportionate share of the money advanced. These provisions cannot be ignored. They must be read in connection with the prior clauses of the contract. When so read, the plain meaning of the whole contract is that the defendant agreed to buy from the plaintiff all of the kind of beer mentioned that he might need in his business at the premises described during the five years mentioned, if he remained in business that long at that place, but if, at any time during such five years, he should part with his interest in the business carried on at that place, or if, for any other reason, he, by his own act, should terminate the contract after November 1, 1910, then he should repay to the plaintiff a proportionate share of the money advanced by the plaintiff. It must not be forgotten that the contract on its face shows that the money advanced by the plaintiff was advanced for supplies and fixtures needed in the defendant's business. When Rand, McNally & Co. exercised their right to cancel the defendant's lease of the premises in question, they did so in pursuance of their contract with the defendant. This was the result of his own voluntary act. It is not claimed that Rand, McNally & Co. forced the defendant to do anything to which he had not expressly - and willingly - agreed. The effect upon his contract with the plaintiff of this cancellation of the lease by the lessor, was precisely the same as if the defendant had given the plaintiff a formal written notice of his intention to terminate the agreement for that reason. Having executed the lease before he made the contract with the plaintiff, and the existence and contents of the lease being known to both parties, it must be presumed that they contracted with reference to the provisions and covenants thereof. This being true, it is a fair inference from



the language of the contract that the parties intended that if the lessor should exercise its right to cancel the lease, the lessee should also at the same time exercise his right to give notice to the plaintiff of his intention to terminate the contract with the plaintiff. The provision for such a notice, however, is a provision entirely for the benefit of the plaintiff, and may be waived by it.

It follows from what we have said, that the trial court erred in refusing the fifth proposition of law, and in finding the issues for the defendant. For this reason, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.



October Term, 1911.  
198 - 19500.  
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WESTERN PINE LUMBER COMPANY,  
Defendant in Error,

vs.

MARTIN E. NELSON,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 41

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

On March 12th, 1912, the Superior Mill and Manufacturing Company, of Grand Haven, Michigan, of which company Martin E. Nelson, the defendant, was the president, was indebted to the Western Pine Lumber Company, the plaintiff, in the sum of \$1034.54, upon an open account for materials sold and delivered. Upon that day, the plaintiff received an order from the mill company for a carload of lumber. Instead of filling the order, the plaintiff wrote the mill company as follows: "We have a car in transit which would fill your order very nicely, and we would be pleased to let you have it, but want the old account straightened up first. Kindly let us have your check for the balance due us, and we will immediately send you invoice for the car above mentioned." On April 1st, 1912, the defendant called at the plaintiff's office in Chicago. There he met one of plaintiff's salesmen, who asked him for a settlement of the mill company's account, and asked if he would endorse the mill company's note for the amount due. The defendant replied in the negative, whereupon the salesman asked if the defendant would guarantee the account by letter. Defendant said that he would do so, if plaintiff "would ship the carload of lumber or establish a credit to the company again as they were." The salesman said: "We will do that," and the defendant, on behalf of the mill company, executed and delivered to the plaintiff its five notes, aggregating \$1071.86, due respectively on April

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20, April 30, May 10, May 20 and May 30, 1912. At the same time and place, he also signed and delivered to the plaintiff a letter referring to the five notes, and concluding with the statement: "I wish to state that I personally guarantee the payment of these notes at maturity, the same as though I had endorsed the notes." The first note was paid at maturity. The other four have never been fully paid. Suit was brought and judgment obtained against the mill company for the amount due on the notes, and the judgment was satisfied upon the payment by the mill company of \$430.35, it being stipulated, however, that such satisfaction should not in any manner affect the liability of the defendant upon his written guarantee. The promised carload of lumber was never delivered to the mill company. This suit was brought against Nelson upon his written guaranty to recover the unpaid balance due on the notes. The affidavit of merits states that defendant's guaranty was signed upon the representation that plaintiff would extend further credit to the maker of said notes, and would ship a carload of lumber which had been ordered, but that after defendant had signed the guaranty, "the plaintiff wholly refused to perform and carry out its said agreement" whereby the consideration for the guaranty "has wholly failed." Upon a jury trial in the Municipal Court, after the facts above stated had been shown, the court directed the jury to return a verdict in favor of the plaintiff for \$430.17, which was done, and from a judgment entered thereon, the defendant has sued out this writ of error.

It will be noticed that the sole defense set up by the affidavit of merits was that the refusal of the plaintiff to carry out its promise to extend further credit or ship the carload of lumber constituted a total failure of the consideration for defendant's guaranty. No counter-claim, or set-off, arising out of a breach of the plaintiff's promise, was set up. In Newton v. Clarke, 138 Ill. App. 196, Newton executed and delivered to one Moran his

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promissory note for \$5000, and when sued upon the same, pleaded that the sole consideration for the note was the plaintiff's promise to deliver to the defendant certain shares of stock, that the stock was never delivered, and therefore, it was alleged, the consideration for the note had wholly failed. As to this defense, the court said (p. 19):

"Upon defendant's own testimony, the promise of Moran to deliver to him shares of stock in an oil company was the consideration for the note. The misfortune of the defendant is not that he did not have Moran's promise, or that anything has occurred to prevent his recovery for breach of such promise, but merely that he has not received the benefit from the promise which he was authorized to expect. \* \* \* The principle is clearly and concisely stated in 1 Parsons on Notes and Bills, 308, thus: 'We must, however, discriminate between a failure of consideration and a failure of benefit resulting from it. A promises B to do a certain thing, and B makes his note to A in consideration of this promise. Then A fails entirely to perform his promise, but sues B on his note. If B retains A's promise, or if the contract is such that A is always and permanently held on his promise, B cannot defend against the note on the ground of a failure of consideration'."

To the same effect is the case of Sage v. Lexie, 28 Ill. 204.

In the present case, the introduction of the notes and letter of the defendant, and proof that the notes had not been paid, made a prima facie case for the plaintiff. The burden of overcoming this was upon the defendant. While he showed that the consideration for his guaranty was the promise of the plaintiff to ship the carload of lumber or establish a further credit, and also showed that this promise had not been kept, this evidence was not offered for the purpose of establishing any cause of action against the plaintiff for a breach of the plaintiff's promise, nor did he attempt to show that such a cross-action would be unavailing, but relied entirely upon the theory that the failure of the plaintiff to keep its promise constituted a total failure of the consideration for defendant's guaranty. Such is not the law. "The case would, in principle, have been nowise different had plaintiff agreed to have paid him a sum of money by a given day, in consideration of his signing the bond, and when the day arrived failed to make



payment. It could scarcely be claimed in such a case, while the defendant would have had his remedy upon his contract, that there was no consideration, or that it had failed." (Cage v. Lewis, supra.)

As the defendant did not choose to assert "his remedy upon his contract," but chose to reserve that for a future action, there was nothing for the court to do but to direct a verdict for the plaintiff.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.



221 - 19,911.

E. F. STAFF,  
Defendant in Error,

vs,

A. STEIGER,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

1913 I.A. 43

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The defendant in error sued the plaintiff in error in the Municipal Court for broker's commissions alleged to have been earned in and about securing for the plaintiff in error a tenant for certain premises on State Street in Chicago. Upon a trial before a jury a verdict was returned in favor of the defendant in error for \$703.30, and this writ of error was brought to reverse the judgment entered upon that verdict.

It is urged that the verdict and judgment are contrary to the weight of the evidence. The evidence is conflicting. If the jury believed the plaintiff's witnesses, the verdict and judgment are right; if they believed the defendant and his witness, the verdict and judgment are wrong. We have carefully considered the evidence and the arguments advanced upon this pure question of fact, and we are unable to say that the verdict is clearly and manifestly contrary to the weight of the evidence. The jury and the trial judge had the opportunity, which we have not, of seeing and hearing the witnesses upon the stand, and the jury's verdict has been approved by the trial judge. We see no sufficient reason, in anything that is said in the briefs or arguments of counsel, to conclude that both were wrong.

It is urged that the evidence does not show that the defendant in error was the procuring cause of the demise that



was made, nor that he procured a tenant, who was ready, able and willing to enter into a lease upon the terms proposed by the plaintiff in error. What has been said<sup>as</sup> to the verdict and judgment is also applicable to this contention. It was a legitimate inference, at least, from the evidence of the plaintiff's witness<sup>es</sup>, if believed by the jury, that the prospective tenant's attention was first called to the property by the plaintiff and that the lease which was actually made was the result. The tenant who signed the lease would have been the best witness on this point, and he was not called as a witness by either side. The defendant was more interested in calling him than was the plaintiff, and the jury may well have drawn an inference unfavorable to the defendant from the fact that this witness was not called, nor his failure to testify satisfactorily explained.

The alleged error of the court in refusing to permit the plaintiff in error to testify to the amount of rental he was paying, is unimportant. The fact sought to be elicited had little, if any, bearing upon the issues involved.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.





October Term, 1915 20  
250 - 19344.

CENTRAL IRON & METAL COMPANY,  
a corporation,

Appellant,

vs.

SEBASTIAN KRUG and NATIONAL  
SURETY COMPANY, a corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

189 I.A. 44

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The Circuit Court sustained a general and special demurrer to a bill in equity filed by the appellant. Appellant elected to stand by its bill and the bill was dismissed for want of equity. This appeal followed.

The bill recites that appellant is an Illinois corporation engaged in buying and selling iron and other metals; that appellee, Krug, is engaged in the business of wrecking buildings; that in May, 1912, appellant and appellee entered into a written contract, by which Krug sold to appellant all the iron, metals, machinery and plumbing goods in certain buildings in Chicago then being wrecked by Krug. By the terms of the contract, Krug agreed to load the materials into appellant's wagons and to use reasonable care "consistent with wrecking operations" to see that such materials "shall not be unnecessarily damaged;" that if appellant failed to furnish enough wagons to carry away the materials as the same should be taken down, Krug should have the right to furnish teams, wagons and men, at the rate of "not to exceed \$3.00 for a nine-hour day per double team;" but, in such cases, at least four tons of material should be placed on each of such wagons. It was further agreed that appellant should keep a watchman on the premises, both day and night, "and take care of said goods;" that all "property belonging to tenants occupying any part of said

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premises is expressly excepted from this contract:" that appellant should pay \$70,750 for said materials, payable \$15,000 down and the remainder in installments of \$5,000 each as the work progressed; that if less than 3,000 tons of material were taken out of the buildings, appellant should be entitled to a rebate at the rate of \$14.15 a ton, while if more than 3,000 tons were taken out, appellant should pay for the excess at a different specified rate per ton. The bill then alleges that appellant fully complied with all the terms and conditions of the contract, but that Krug did not; that he "negligently tore away part of the material and dropped it from a great height, whereby it was twisted, bent and broken" and its value materially lessened; that he "improperly and maliciously" and with intent to defraud appellant, loaded less than four tons weight upon some of the wagons, "thereby materially increasing the number of loads;" that he refused to permit appellant to remove any material from one of the buildings, but permitted others to do so; that appellant protested because of these matters, and thereupon each of the parties executed and delivered to the other a bond for the faithful performance of the contract; that, notwithstanding such bond, Krug continued to violate the contract "by interfering with the teams of orator and preventing orator's teams from entering said premises for the purpose of hauling away metal and material described in the contract;" that he "removed metal and material in quantities and qualities and to places to your orator unknown," and sold and delivered the same to other parties: that appellant made the payments as stipulated in the contract, and thereby paid for more material than it received from Krug, who. (it is said) "by the terms of said contract became a trustee to deliver to orator the metal and material therein referred to;" that "by fraudulently and improperly refusing to deliver to orator metal and material taken from said building, and by removing metal and material

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from said building and delivering same to other parties, said Krug violated said contract and said trust" and became liable for the market value of the material so removed and delivered to others; that the materials thus "fraudulently and improperly removed and delivered to other parties were, as orator is informed and believes, of different qualities, quantities, kinds, character, weights, values and conditions of repairs;" that appellant has no means of ascertaining the quantity and character of the materials so removed, and that Krug is the only person who has knowledge thereof; that Krug has refused to give to appellant a correct statement of these matters, and that a discovery is necessary to compel him to disclose the same; that appellant has requested, and Krug has refused, an accounting; that "the items of account and various charges and acts and doings of the different parties in connection with the performance and execution of said contract, are of a complicated and intricate character such as cannot be fairly or intelligently determined in an action at law;" and that Krug has begun two suits, one against appellant, claiming \$50,000 damages for breach of contract, and the other against the surety on appellant's bond. The bill prays for an accounting and discovery, not under oath, and for an injunction to restrain the further prosecution of Krug's lawsuits.

We think the foregoing statement of the contents of the bill of complaint shows that appellants are seeking to enforce in equity, a purely legal demand. The facts stated do not create a trust, nor establish any fiduciary relationship between the parties. The alleged conduct of Krug amounts to a mere breach of contract, for which the remedy at law is fully adequate. The bill cannot be maintained as a bill for discovery, for the reason that it appears from the allegations of the bill that at the time the contract was made, appellant had,

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or ought to have had, full and complete knowledge of the nature, character, quantity and quality of the materials it purchased from Krug. There is no averment in the bill tending to show that anything was concealed at that time, nor that appellant was in any manner deceived. If any of the material purchased has not been delivered, no reason is apparent from anything stated in the bill, why appellant's knowledge, or wants of knowledge, as to that fact, and as to the nature, character and extent of the shortage, is not as full and complete as that of Krug. On the contrary, the bill expressly states that appellant prepared an itemized statement in writing, showing a balance due to appellant of \$40,943.50, and notified Krug that it "was prepared and willing to check up said statement of account with defendants." The averment that the account is "of a complicated and intricate character" is a mere conclusion. The mere fact that some, or even all, of the items of an account are not admitted to be correct, does not make the account complicated nor intricate. If an inspection of Krug's books is desired, that can be obtained in a court of law. Swedish American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 532, 574. The mere fact that an accounting may be necessary is not, of itself, sufficient to give a court of equity jurisdiction, and the fact that part of appellant's claim is based upon the alleged negligence of Krug in dropping some of the materials "from a great height," giving rise to an unliquidated claim for damages, is sufficient, in itself, to oust a court of equity of jurisdiction. "Where a court of law is competent to afford an adequate and ample remedy, courts of equity will remit the parties to the courts of law, where the right of trial by jury is secured to them." County of Cook v. Davis, 143 Ill. 151.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.





LILLIAN EGGERT, Administratrix  
of the Estate of F. C. EGGERT,  
Deceased,

Appellee,

vs.

PENNSYLVANIA COMPANY and PITTS-  
BURGH, CINCINNATI, CHICAGO & ST.  
LOUIS RAILWAY COMPANY,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

189 I.A. 58

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellants in the County court of Cook county, for damages to an automobile, caused by a collision between it and one of appellants' engines, at a railroad crossing on Throop street, Chicago. Throop street runs north and south and a single railroad track, used by appellants, crosses the street at right angles. The track is a little above the grade of the street, and the approach to the crossing is up a slight incline. On the west side of the street, close to the sidewalk, and at a distance from the south rail of the railroad track, variously estimated by the witnesses at from 20 to 27 feet and 9 inches, is a two-story factory building. On the same side of the street, just north of the railroad track, is an electric bell, designed to ring automatically as locomotives approach Throop street. The collision occurred about four o'clock in the afternoon. Appellee's intestate, a physician, was calling on a patient at a house located 75 feet south of the railroad track on the east side of Throop street, and his automobile stood at the curb facing north. The automobile was a coupe, and the left-hand windows were open. When he came out of the house, he looked toward the crossing, and then "cranked up" his machine. He testified that at that time he heard no bell or signal and saw

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no train approaching; that he stepped into the automobile, and started it north towards the crossing; that while he went north, he "looked to see whether anything was coming;" that on account of the incline, he was obliged to, and did, put on a speed of 6 or 7 miles an hour; that as soon as he "got to where you could see around the corner of the factory," he saw an engine coming from the west at a speed of fifteen miles an hour; that at that instant, the front wheels of the automobile were close to the track; that he tried to reverse, but was unable to do so; that he then turned the front wheels to the right, and appellants' engine struck the machine obliquely, shoving it to one side and causing the damage for which this suit was brought. Appellants' evidence tended to prove that the engine was going only about ten miles an hour, that its bell was ringing, and that the electric bell at the crossing was also ringing.

It is urged that the evidence fails to show that the doctor "stopped, looked and listened" before approaching the crossing; that the evidence proves that the injury to the automobile resulted solely from his contributory negligence; and that the court erred in giving two instructions.

The first two contentions raise a pure question of fact, and after a careful examination of the evidence in the record, in the light of the arguments of appellants' counsel, we are unable to say that the verdict is manifestly contrary to the weight of the evidence. At the rate of seven miles an hour, the space to be crossed by the automobile after it was in a position where it was possible to see the approaching engine, would be covered in less than three seconds. The evidence is conflicting as to whether the crossing bell was ringing at that time. There is some evidence to the effect that it did not always ring when a train approached, and did not ring at that time. The factory was a re-

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fining plant, in noisy operation. "It cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault or where the surroundings excuse such failure." Heidenreich v. Brenner, 280 Ill. 439, 451. The jury and the trial judge have found that the doctor acted as a reasonably prudent person would ordinarily act under like circumstances, and we cannot say they were wrong.

As to the instructions complained of, the one defining the words "ordinary care" is essentially different from the instruction condemned in the case of North Chicago St. R.R. Co. v. Cossar, 203 Ill. 308, upon which appellants rely. In that case, the words "under like circumstances" were followed by the phrase "and in the same situation," thereby confining the question of due care to a consideration of the situation of the plaintiff at the precise moment of the injury, regardless of his conduct in placing himself in that situation. Here the qualifying clause was omitted. The same objection was raised and answered against appellants' contention in the case of Schaedel v. Chicago Railways Co., 192 Ill. App. 70. The other instruction objected to has been repeatedly approved and does not purport to refer to the measure of damages.

It is finally urged that the amount of the verdict is not supported by the evidence. There was evidence that the reasonable value of the use of appellee's automobile was \$50 a week. This sum, added to the cost of the repairs necessitated by the collision, equals practically the amount of the verdict. "In cases of collision, the innocent party is entitled to recover from the wrongdoer what it is reasonably necessary for him to pay, and he does pay, in order to repair the damage done, and also a reasonable sum for the loss of the use of his carriage while he is necessarily deprived of its use." Travis v. Pierson, 43 Ill. App. 579.

Finding no reversible error in the record, the judgment of the County Court will be affirmed.

AFFIRMED.

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LOUIS KUSHNER,

Defendant in Error,

vs.

LOUIS PERLMAN,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

199 I.A. 59

H. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The plaintiff, Louis Kushner, was employed by the defendant, Louis Perlman, as a cobbler and the sole salesman in the defendant's shoe store for eleven years. At various times during that period the employer borrowed money from his employee, until the total equalled \$600, which the employer promised to repay on demand. On July 7, 1913, the plaintiff asked his employer for the return of this money. The defendant said he would pay in a week. At the end of the week, defendant asked for more time, promising to raise the money by Friday, July 25th. When that day arrived, instead of repaying the loan, he accused the plaintiff of theft, and refused to pay. At that time, he had a lawyer present who asked the plaintiff to explain two small discrepancies upon one of the cash register slips for that day. The plaintiff offered a reasonable explanation, but the lawyer telephoned to the police station for a police officer. When the officer arrived, he asked what the trouble was. The lawyer said "Kushner has been robbing Perlman," and showed the officer the tape from the cash register for that day as proof that Kushner had failed to "ring up" a sale of \$3.50. Kushner began to cry, and begged not to be locked up. The defendant replied: "All right. I will let you go until Monday." The next day the plaintiff and defendant went to the lawyer's office, where a document was prepared and signed, purporting to be an admission

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that Kushner had been "caught in the act of withholding funds received in the usual course of business while selling shoes to customers," and an agreement on Kushner's part to accept \$300 from Perlman in full settlement of the \$300 due from Perlman. Thereupon the defendant's lawyer gave the plaintiff his (the lawyer's) check for \$300. This check was never used. The plaintiff sued for the full amount due him, and defendant relied on this alleged accord and satisfaction. Upon the trial, the plaintiff denied that he had ever taken anything belonging to the defendant and the defendant made no proof fairly tending to prove any defalcation on the part of the plaintiff.

The trial court held, and we think very properly held, that there was no consideration whatever for the alleged settlement, and that it was not binding on the plaintiff. The mere fact that the trial judge used some strong language in deciding the case is not sufficient, in our opinion, to reverse a judgment which is clearly right upon the merits.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

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JOHN HULLA and E. BLOOMER,  
Defendants in Error,

vs.

LOUIS KAPLAN,  
Plaintiff in Error.

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

109 I.A. 61

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

After entering his appearance in the Municipal Court, filing an affidavit of merits and demanding a jury trial, the defendant in this case (plaintiff in error here) failed to appear when the case was called for trial upon the regular call of the jury calendar, and the case was tried and a verdict and judgment rendered against him in his absence. Three days later, he filed a motion to vacate the judgment, supported by the affidavit of himself and one of his attorneys. This motion was heard and denied. Five days afterwards, he made a second motion of the same character. This was also heard and denied, whereupon this writ of error was sued out.

The principle is too well established to require the citation of authorities that motions of the character made in this case are addressed to the sound judicial discretion of the court and, unless we can see that there has been an abuse of discretion, the ruling of the trial court will not be disturbed. The suit was brought to recover a balance of \$250 due on a written contract for the construction of a "five-cent theatre building," and extras amounting to \$505.28. In the affidavit of merits, filed nearly a year before the trial, the defendant admitted that after some controversy between him and the plaintiffs, he had agreed "that if the plaintiffs would wait until October 17, 1912, this defendant would recognize a balance due on their contract of \$2102.50, and that he

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would pay \$1500 on said balance, and on the above mentioned date, he would make arrangements to pay balance in installments, that he paid \$1500 but after making said payment and after he, the defendant, had waived any claim he might have had, the plaintiffs refused to live up to their agreement." Upon this admission, the balance stated was due long before the trial was had.

The record shows that the defendant had two attorneys. One of them, whose name is not on the written appearance of the defendant, filed an affidavit upon the motion to vacate, stating that the reason he was not in court at the time the case was called was that he had mislaid his calendar and was unable to procure another, and that the case was called for trial on the first court day after the summer vacation was ended, and that he was not in Chicago until the day before the trial. This is not a showing of due diligence, and the other attorney filed no affidavit of any kind. The only real defense shown by any of the affidavits consists of the alleged failure of the plaintiffs to furnish the defendant with "lien waivers," as required by the contract. But one of the affidavits states that when the \$1500 payment was made, it was "understood and agreed that all waivers of lien will be delivered to said Kaplan when balance on contract and extras, amounting to \$602.50, or signed notes for that amount are delivered;" and it does not appear that Kaplan ever delivered or offered to deliver his "signed notes" for that amount, or ever paid, or offered to pay, or was ready and willing to pay, the balance then admitted to be due.

Upon the whole record, we see no sufficient reason for concluding that the trial court abused his discretion in refusing to vacate the judgment. The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

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ARM TUBOR and SAM VALICK,  
Defendants in Error,

vs.

TIMOTHY CRIMMINGES,  
Plaintiff in Error.

} ERROR TO

} MUNICIPAL COURT

} OF CHICAGO.

189 I.A. 62

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

The Municipal court entered judgment by confession for \$26 rent due under a written lease, and \$25 attorney's fees, against the plaintiff in error. On his motion, the judgment was opened to allow him to make defense, and upon a trial before the court, without a jury, the judgment was confirmed. Plaintiff in error contends in this court that the evidence shows that he did not sign the lease, and also that the lease was surrendered "by an executed agreement between the parties." Neither of these contentions, in our opinion, is well founded. The evidence shows that while the lease was not signed by plaintiff in error in person, his name was signed by his brother, and he ratified his brother's act by taking possession of and occupying the premises, and paying rent under it for several months. Moreover, the affidavit of merits does not deny the execution of the lease. As to the alleged surrender, the evidence is conflicting, plaintiff in error and his brother testifying to one state of facts, and the defendant in error to another. The only witness on this point who can be called disinterested is the witness Dorman, to whom the plaintiff in error turned over the premises, with the consent of defendant in error. The two Crimmings brothers testified that the agreement then made was that plaintiff in error should be released if he got a sub-tenant out of the barn, which was included in the demise, and that this was done. Dorman, however, testified that he kept the tenant

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in the barn and collected rent from him for a while, and also testified that he did not assume the lease. Upon the whole record, we think the trial court was justified in finding that the defendant's evidence as to the alleged surrender was not sufficient to overcome the positive testimony of the defendant in error to the effect that he did not release nor agree to release the plaintiff in error.

The judgment of the Municipal court will be affirmed.

AFFIRMED.



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GUSTAVE ANDERSON,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

CH CHICAGO.

169 I.A. 2

MR. PRESIDING JUSTICE FINCH

DELIVERED THE OPINION OF THE COURT.

Appellees recovered a judgment in the Municipal Court of Chicago against appellant for \$1291.87 for commissions earned by appellees, as real estate brokers in procuring a purchaser for certain real estate belonging to appellant. The trial was had before the court without a jury. Appellant claims that the evidence is insufficient to sustain the judgment. Appellees insist that this court has no authority to determine that question because no exception was taken to the judgment.

In the recent case of Blake v. DeJonghe Hotel Co., 283 Ill. 471, it was held that the rule which obtains in the Circuit and Superior Courts,--viz: that in a case tried by the court without a jury the sufficiency of the evidence to support the judgment cannot be inquired into on appeal in the absence of an exception to the judgment (Climax Tag Co. v. American Tag Co., 234 Ill. 179), is applicable to appeals from the Municipal Court, and that Section 33 of the Municipal Court Act, which provides to the contrary, is unconstitutional and void. In the same decision, however, it is stated that the case then before the court was tried before the recent amendment to Section 81 of the Practice Act was enacted, and the effect of that amendment upon the rule was not decided. The present case was tried subsequent to July 1, 1911, and the bill of exceptions does not show any exception to the judgment. Appellees claim that by the 1911 amendment to Section 81 of the

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Practice Act, the former rule was changed so that a formal exception to the judgment is no longer necessary.

By comparing Section 81 of the Practice Act, as amended in 1911, with the section as it was before the amendment was made, it will be seen that the legislature did not thereby abolish exceptions, or bills of exceptions, but merely inserted a provision for an alternative method of presenting questions for review, in the form of a "stenographic report of the trial." Prior to July 1, 1911, the first sentence of Section 81 was as follows: "If during the progress of any trial in any civil or criminal cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception and sign the same, and the said exception shall thereupon become a part of the record of such cause." This sentence is the same as original Section 59 of the Practice Act of 1845 (which became Section 50 in the revision of 1874), except that the words "and seal" were omitted (in 1903) after the word "sign." To this sentence there was added, in 1907, a provision, not here in question, authorizing another judge than the trial judge to sign the bill of exceptions under certain circumstances. In 1911, without changing the sentence above quoted, the legislature inserted before that sentence the following words: "If during the progress of any trial in any civil or criminal cause, either party shall submit to the court any matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken upon appeal or by writ of error without formal exception thereto, and after judgment, at any time during the term of the court at which judgment was entered or within such time thereafter as shall, during such term, be fixed by the court, any

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party desiring to prosecute a writ of error to or appeal from any such judgment, may submit to the court a stenographic report of the trial containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof, and he shall examine the same, and if correct, officially certify to the correctness of such report, and the same shall thereupon be filed in said court and become a part of the record in said cause, and all matters and things contained in such stenographic report shall become as effectually a part of said record as if duly certified in a formal bill or bills of exceptions, or \* \* \*."

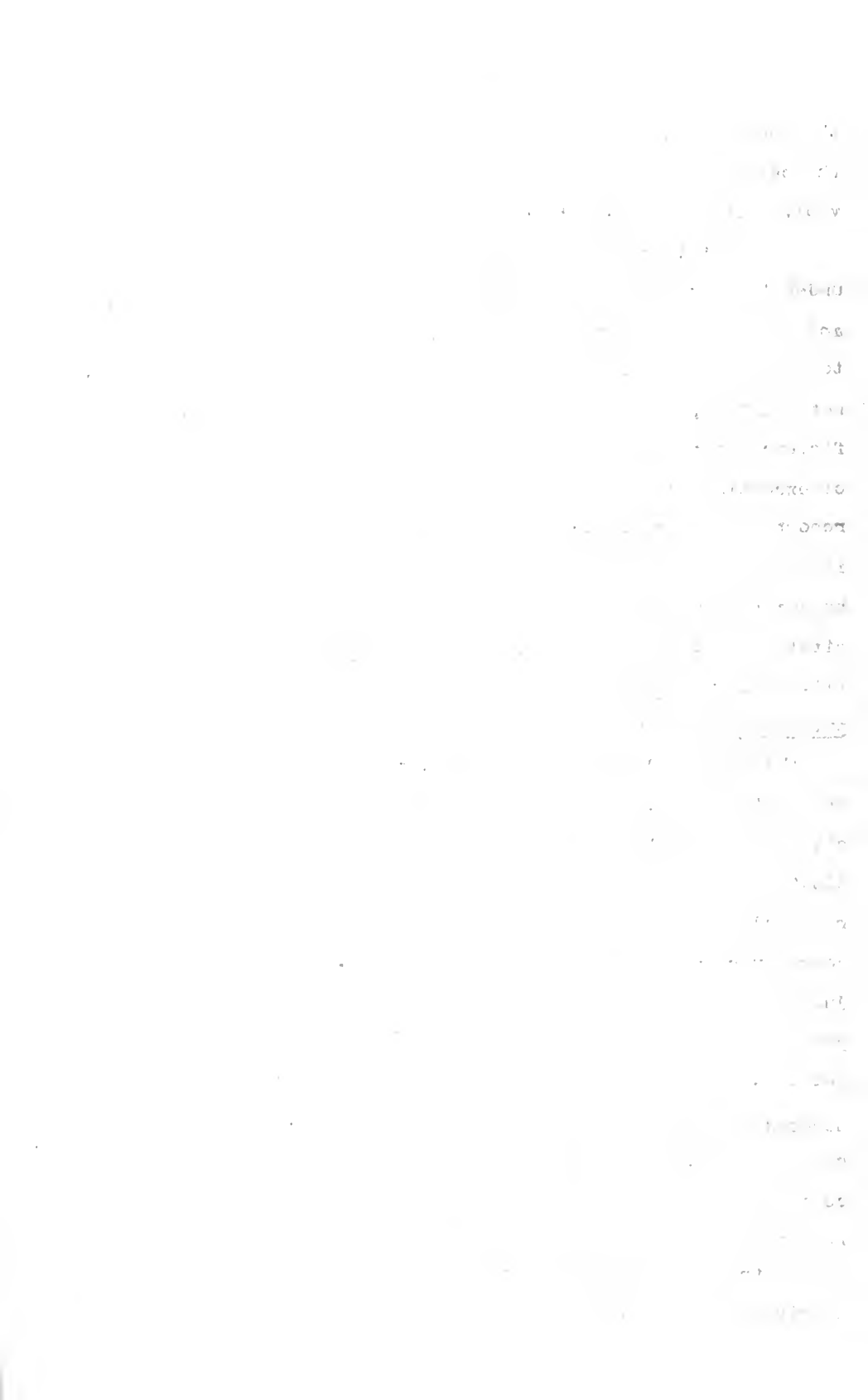
As thus amended, Section 81 of the Practice Act, as so construed it, gives to the party desiring to have the record of any trial reviewed on appeal or writ of error the choice of two distinct methods of preserving for review matters not otherwise appearing of record. The first method is the usual bill of exceptions: the second is the "stenographic report of the trial." If he chooses to pursue the usual bill-of-exceptions method, he may do so in exactly the same manner and form, and with precisely the same effect, as if the amendment had not been passed. If, for any reason,--such as, for example, a failure on his part to save his exceptions at the proper time or in the proper manner--he does not choose to present a formal bill of exceptions, then, under the amendment of 1911, he may, at his option, submit, in lieu thereof, a "stenographic report of the trial, containing the evidence and the ruling of the court upon all or any of the questions submitted to and ruled upon by the judge thereof." If he adopts the latter method, the trial judge is required by the amendment to examine the stenographic report submitted to him and if found correct, to "officially certify" to its correctness; and if it appears from such report that any matter was submitted to





the court for a ruling, and that the court "ruled adversely to the party submitting the same," then such ruling is saved for review, whether any exception be noted or not.

In this case, appellant chose to follow the old and well understood practice of presenting a formal bill of exceptions, and the same was certified, signed, and filed as such. It fails to show any exception to the judgment, and therefore appellant is not entitled, under the well settled rule, to question the sufficiency of the evidence to support the judgment unless the bill of exceptions can be treated and considered as a stenographic report of the trial such as the amendment of 1911 permits. It is true that the evidence is set forth in the bill of exceptions by question and answer, and that the bill contains the same recitals that were held, in C. M. & St. P. Ry. Co. v. Walsh, 150 Ill. 607, and Cerny v. Glos, 261 Ill. 331, to be sufficient, prima facie, to show that the bill contains all the evidence. But the trial judge does not certify that the bill is a correct or complete stenographic report of the trial, and the very brief statement of what occurred at the close of all the evidence indicates that the conclusion of the trial was not stenographically reported. At no place in the bill does it appear that the trial court ever pronounced judgment in the case. The only place that a judgment is mentioned is the clerk's transcript. That is the proper place for it, if the bill-of-exceptions method is adopted. But in a stenographic report, the fact that a judgment was pronounced must necessarily appear. Under these circumstances, we cannot hold that the document filed in this case as a bill of exceptions is, in fact, such a stenographic report as the amendment requires. We do not wish to be understood as holding that the form of the trial judge's certificate is, of itself, necessarily conclusive as to the character of the document filed. We merely hold



that in this case, the failure of the bill of exceptions to show that any exception was taken to the judgment cannot be cured by treating the bill as a stenographic report, because regardless of the judge's certificate, it appears on its face not to be a stenographic report.

As there is no error, that we can consider, in the record, the judgment will be affirmed.

AFFIRMED.

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GEORGE LAUTH,  
Defendant in Error,

vs.

RALPH G. BADEAUX,  
Plaintiff in Error.

) ERROR TO

) MUNICIPAL COURT

) OF CHICAGO.

189 I.A. 8

MR. JUSTICE PAM D LIVERED THE OPINION OF THE COURT.

This is an action brought by the defendant in error, hereinafter for convenience called the plaintiff, against the plaintiff in error, hereinafter called the defendant, on a promissory note given by defendant to plaintiff on April 14, 1911, which note was in the following words:

"\$375.00

April 14, 1911.

On or before three years after date, I promise to pay to the order of George Lauth, Three Hundred and Seventy-five and no/100 dollars, at Chicago, Illinois, value received.

Number \_\_\_\_\_ Due \_\_\_\_\_

R. G. BADEAUX."

At the time this note was given, plaintiff was in the employ of the defendant who was then in the real estate business. Plaintiff had assisted defendant in a transaction wherein the defendant bought a certain piece of property and resold it at a profit of \$750, and to which we will hereafter refer as the Walsh real estate transaction; and for the services rendered defendant he was to receive one-half of the profit; and "on the 14th day of April, 1911, there remained unpaid from the purchaser of this piece of land, a note held by the defendant, which was not due, for the sum of \$750, with interest, secured by mortgage, which represented the profit, and which was payable on or before three years from its date." (The aforesaid quotation being from plaintiff's statement of the case.)

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This note for \$750 was paid some time prior to December 16, 1911, which was prior to the beginning of the suit in question.

At the time of the trial, plaintiff introduced the note in evidence; objection was made to the receipt of the note in evidence, on the ground that according to its terms the note had not yet matured, and that action on the said note had been prematurely brought; which objection was overruled.

Plaintiff also offered in evidence a conversation had with defendant at the time the said note was given. The substance of the testimony offered was that the plaintiff had said to defendant that there was due him from the defendant his half share of the profit in the Walsh real estate transaction, and which was represented by the aforesaid note for \$750; that there ought to be some evidence of that indebtedness, as death might ensue and plaintiff would have no evidence thereof; that the defendant at first demurred but finally gave the note in question, and stated to the plaintiff that when the deal was finally closed and as soon as the note for \$750 secured by mortgage, payable on or before three years, was paid, that he, the plaintiff, was then to receive his half share of the profit, and that it was on that condition that plaintiff accepted the note in question. Objection was made to this testimony, on the ground that it tended to alter or modify or otherwise change the contents of a written instrument; which objection was overruled and the evidence received.

The court, in its instructions to the jury, placed this evidence before them and instructed the jury that they had a right to consider that evidence in arriving at a verdict. These instructions also were objected to by defendant, but the objection was overruled; i.e. the court refused to give instructions as suggested by the defendant, to the effect that this note could not be sued on before its maturity, - which request was denied by the court.

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Plaintiff contends in support of the judgment of the court and the verdict, that the court was warranted in receiving this testimony as to the conversation, upon the theory that this note was merely evidence of an oral agreement made between plaintiff and defendant as to the payment of the money due him because of his assistance in the Walsh real estate transaction; that this conversation stated what the agreement actually was. We cannot see how this theory can be maintained, in view of the statement of claim filed by plaintiff in the court below.

In the statement of claim, nowhere does it appear that the note is merely evidence of a parol agreement. The opening words of the statement of claim indicate the basis upon which the suit was brought, which words are, "that plaintiff's claim is for \$375 due upon a note payable on or before three years from its date, April 14, 1911, and in words and figures following." Then follow the exact words of the note as heretofore given. In the course of the statement of claim, mention is made of the fact that there was an understanding and agreement that when the aforementioned mortgage had been paid, the \$375 note would be due and payable; and also, that the said note had been paid and the mortgage released. The statement of claim clearly, therefore, indicates that this action is not based upon any parol agreement of which the note was simply an evidence of his interest in the note for \$750, but rather this note for \$375 itself.

The defendant in his affidavit of merits clearly sets out the fact that the action could not be maintained because the note set out in plaintiff's statement of claim was not yet due and that therefore the action was prematurely brought. The affidavit of merits also denied the fact that there was an understanding such as is claimed by plaintiff. The defendant, during the course of the trial, offered testimony to that effect. Plaintiff did not



re-state his claim or ask to amend it, but went to trial upon this statement of claim and affidavit of merits. The basis of the plaintiff's claim therefore, in our opinion, under the issue presented, was the note in question.

If this had been a suit in the Superior or Circuit court and the declaration had set out the facts set forth in the statement of claim, a demurrer to that declaration would have raised the same question as was raised by the affidavit of merits filed; and would have - or at least should have - been sustained. There being no such provision in the Municipal court procedure, the defendant raised his objection at the earliest opportunity by objecting to the receipt of the note into evidence; and also further, by objecting to the admission of the evidence with reference to the conversation had at the time the note was given.

The note was not uncertain in its language, nor vague; and it clearly stated a definite amount to be paid and a definite time of payment, and therefore was regular in form. There was no evidence of fraud, deceit or mistake in the making of the note.

Plaintiff relies upon the testimony offered and received by the court, to vary the terms of this written instrument, which we have heretofore held was made the basis of the action by the plaintiff in his statement of claim. This is a suit at law, and if the note which represented the agreement of the parties did not truly set forth the agreement arrived at, and there was either fraud or mistake or deceit practiced by the defendant in making the terms of his note contrary to the agreement, the plaintiff's remedy would be in a court of equity.

We think it pertinent to make this observation with reference to the case at bar: Plaintiff's claim is for one-half of the profit realized by the defendant in the Walsh real estate transaction, for services rendered the defendant by the plaintiff in and about that transaction. This profit was evidenced by the

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note for \$750 secured by mortgage payable on or before three years. The obligation to pay this \$750 existed, and the evidence of that obligation was in the hands of the defendant. By the giving of this note for \$375 payable on or before three years, the defendant was bound to pay the plaintiff that amount, irrespective of the fact whether or not defendant received payment of the \$750 note, i.e. as far as the note in question, viz: for \$750, evidenced the agreement between the parties. Had this note matured and the defendant had failed to pay the note at its maturity, viz: three years after its date, April 14, 1911, and the plaintiff had instituted proceedings against the defendant upon this note, and had the defendant presented the defense that the note was to have been paid out of the proceeds collected by the defendant on the \$750 note, and had the defendant in support of this contention offered this identical parol evidence, we believe it would have been promptly objected to by the plaintiff, and properly so.

Plaintiff presents two propositions which he contends control the issues of the case; first, that the law prohibiting the admission of evidence of a contemporaneous verbal agreement does not apply to cases in which it would be a fraud on one of the parties to the instrument to apply the rule. The authorities cited on this point are all of foreign jurisdiction. A consideration of these cases shows the facts to be different from the case at bar: On the contrary, the facts in the case at bar, in our opinion, do not permit the application of the principle contended for.

Plaintiff then contends that when a written instrument is incidental to an agreement, the whole transaction may be shown by parol; and on this point cites several authorities, among which are two from our own State. Upon that point we have already held that the plaintiff in this case did not base his claim upon a parol agreement, but based it upon the terms of a written instrument, which he endeavors to alter by offering evidence as to a parol agreement.



The law favors the incorporation into written contracts or promissory note, <sup>of</sup> the agreement of the parties. If the agreement had been such as plaintiff contended for, it would have been an easy matter to have had the note evidence such agreement: and notes evidencing such agreements have received time and again the sanction of our courts. Many cases can be cited on this point. We, however, refer to only one, that of McCarty v. Howell, 24 Ill. 342, which case has been cited favorably in many later decisions in our own State.

Defendant has cited many authorities in support of his contention that the note should not have been received in evidence because on its face it had not yet matured: and of his further contention that parol evidence offered should have been excluded because it was an endeavor to modify or alter the terms of a written instrument by parol evidence. There is nothing in the facts of this case which makes it an exception to the principle laid down in the many authorities cited by the defendant.

There was an additional item in the plaintiff's claim, based upon commissions due to the plaintiff from defendant because of another real estate transaction. Error was assigned upon the instructions given by the court with reference to that item. The judgment in this case was for \$432.50. The item of plaintiff's claim covered by the note was for \$275. Inasmuch as we are of the opinion that the court below erred in its rulings and instructions with reference to the note item, it is unnecessary for us to pass upon the errors assigned on this additional item in plaintiff's claim.

For the reasons hereinabove assigned, the case will be reversed and remanded to the Municipal court for further proceedings not inconsistent with the views herein stated.

REVERSED AND REMANDED.

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CITY OF CHICAGO,

Defendant in Error,

vs.

FRANK J. VERAGHTY,

Plaintiff in Error.

BRICK TO

COMMUNAL COURT

OF CHICAGO.

139 I.A. 0

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

This is a quasi-criminal action brought by the City of Chicago, defendant in error, hereinafter referred to as the plaintiff, against Frank J. Veraghty, plaintiff in error, hereinafter referred to as the defendant, charging the defendant with making, aiding, countenancing, and assisting in making an improper noise, riot and disturbance, breach of the peace, etc., contrary to and in violation of section 2012 of the Chicago Code of 1911.

The facts in the case show that the defendant, who was an employee of the Chicago Guaranty Survey Company, on Monday, April 13, 1911, was engaged in making a survey for the Pennsylvania railroad, running a line on Canal street from Twelfth street to Carroll avenue. He was the civil engineer in charge of the instrument and chainmen.

Between 3:30 and 4:00 o'clock on the afternoon of that day, they were employed on Canal street between Monroe and Madison streets. It was about this time that the arrest was made by M. J. Gallery, a lieutenant of police for the City of Chicago, who also signed the complaint on which the defendant was held.

After the arrest was made, the defendant called upon the other men in his gang to accompany him to the Dear Plaines street station, where the three other men were also placed under arrest. About 7:40 that night all were released on bail and were informed



that the case would be heard the next morning at 9 o'clock. Defendant at that time lived in Lake Bluff, a suburb of Chicago, more than twenty miles away.

The next morning defendant and the three other men appeared in court, and when the case was called, defendant asked for a continuance upon the ground that he hadn't had time to engage a lawyer; whereupon the court stated to him that he did not need a lawyer and ordered that the case proceed. There was no attorney there representing either the defendant or any of the other men. The case proceeded, and the only witness called by the plaintiff was M. J. Gallery, the aforesaid lieutenant of police. The statement of facts certified to by the trial judge sets forth his testimony as follows:

"I was down on Canal and Madison Street at three P.M. yesterday, and there had been complaints put in about some surveyors knocking down and throwing men off of sidewalk and I witnessed the same. Thereupon I arrested this man (indicating the defendant, Frank J. Beraghty) and was sorry I had to do so, because his brother is a personal friend of mine. This defendant said he was working for the Chicago, Milwaukee & St. Paul Railroad Company, and is the most vindictive man I ever saw."

No other testimony was introduced on behalf of the plaintiff.

Defendant then testified that while at work, the first thing that attracted his attention was a man saying, "Show your credentials," and, turning around, he saw this man talking to Roger Secombe, one of defendant's assistants; that he then turned away, and a moment later heard the remark, "I will show you;" whereupon defendant turned and said to the man, "What will you do?" and the man replied, "Who are you doing this for?" and defendant answered, "None of your business;" that thereupon the man grabbed the surveying instrument as though to throw it into the street, whereupon defendant said, "I will have you arrested," and turned to call a policeman, when the man seized him by the neck and declared he was under arrest; and that was the first time he informed defendant that he was a lieutenant of police; that there was nothing in his dress or outward appearance indicating that he was an officer.

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The court did not call upon the other men to give testimony, and fined defendant five dollars and costs, discharging the other men. Defendant was then informed that unless the fine was paid he would be sent to the bridewell. Defendant at once informed the court he wished to take an appeal and asked what the proper procedure was, but the clerk simply told defendant that unless the fine was paid he would be detained and sent to the bridewell; whereupon defendant paid the sum of \$11, which was the fine and costs in the proceeding.

On the following day, the 15th of April, defendant appeared in court, accompanied by his counsel, and asked the court to vacate the judgment and grant a new trial; this motion was continued until April 22, on which date the trial judge proceeded to hear the said motion. The court refused to consider the affidavits of defendant on the motion to vacate the judgment and grant a new trial, but gave leave to file them and have same become part of the record in the case. The motion to vacate was overruled, as was the motion for a new trial.

On May 2, 1913, a similar motion was again made, based on the same affidavits, and the court again refused to set aside and vacate the judgment, and also refused to grant defendant a new trial.

The affidavits presented in behalf of the motion to vacate the judgment and grant a new trial clearly set forth that if the men who were with defendant at the time he was arrested had been permitted to testify, they would have corroborated the testimony of the defendant at the time of the trial.

Defendant contends that the court erred in overruling his motion for a continuance whereby he was not given an opportunity to present all of his evidence; furthermore, that the finding of the court is against the weight of the evidence; and the court erred in refusing to hear the affidavits in support of his motion to vacate the judgment and grant a new trial, and erred in overruling his motion for a new trial.



The record in this case shows that the day in question was Sunday; that the defendant was released on bail at 7:40 P.M.; that he lived many miles from the city, and was compelled to be present in court again early the next morning. We believe that his request for a continuance in order to engage an attorney, under the circumstances, was most reasonable. The court's act in denying that right, and saying defendant had no need of an attorney's services was clearly an abuse of the discretion of the court. If an attorney had been there representing the defendant, the other men who were arrested and who were present at the time of the trial would have been called upon to give their testimony. The affidavits filed, but not considered by the court, show what that testimony would have been. They would have so strongly corroborated the defendant in his testimony that the court would have been compelled to discharge the defendant.

We, furthermore, are of the opinion that the judgment of the court was manifestly contrary to the weight of the evidence. A careful reading of the testimony of the officer does not show wherein the defendant was guilty of the offense with which he was charged.

For the reasons hereinabove assigned, the case will be reversed with a finding of facts.

REVERSED.

Finding of facts to be incorporated in the judgment:  
The court finds from the evidence that the defendant was not guilty of the offense charged in the complaint.





R. A. WELLS LUMBER COMPANY, a  
corporation,

Defendant in Error,

vs.

JONATHAN DUNFEE,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 1

STATEMENT OF THE CASE. This is an action brought in the Municipal Court of Chicago by the R. A. Wells Lumber Company, a corporation, defendant in error and hereinafter referred to as the plaintiff, against Jonathan Dunfee, plaintiff in error and hereinafter referred to as the defendant, to recover the sum of \$123.75 and interest.

This suit, the plaintiff sets forth, arises out of a written contract or evidence of indebtedness signed by the said defendant, whereby the said defendant undertook and promised to pay the plaintiff on demand the sum of \$123.75 with interest thereon; the exact language of the said writing being as follows:

"Sold subject to our inspection only.  
No. 13250. Chicago, September 13, 1909.  
Received from R. A. Wells Lumber Co.,  
S. W. Cor. Clark and 32nd Sts., 2743 Ft.  
1" walnut.

This lumber is to be \$45.00 per M ft.  
(Signed J. Dunfee)

The defendant filed an affidavit of merits wherein his defenses were as follows:

First. That said suit is not brought on said instrument but is brought on the lumber mentioned therein and is an open account barred by the statute of limitations.

Second. That this defendant never accepted said lumber and never received same.

Third. That said lumber was not up to grade and was refused by defendant upon tender to him for that reason and has never been accepted or received by defendant.

Fourth. That this defendant never signed said instrument.

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This case was tried once before in the Municipal court, <sup>See 170 308 App 475</sup> from which an appeal was taken to this court, in this, as in the previous trial, the case was tried by the court without a jury and on the same statement of claim and affidavit of merits.

In the previous case the court, upon the first point raised in the affidavit of merits, found the issues for the defendant, and from the judgment entered against the plaintiff an appeal was prayed. The facts with reference to that issue presented at the previous trial <sup>the</sup> were <sup>the same</sup> as at this trial. Certain facts were not in dispute, namely, that on or about September 15, 1899, defendant called Wells on the telephone and stated he desired a wagonload of walnut lumber; that Wells agreed to send defendant over a load and that the price was \$65 per one thousand feet; that on September 16, 1899, Charles Lindgren, driver for the plaintiff, delivered the load of lumber, and when he arrived at defendant's yard with the lumber, he had with him and gave to the defendant the instrument set forth in plaintiff's statement of claim, which was the usual delivery ticket in the following words and figures:

"Sold subject to our inspection only.  
No. 13250. Chicago, September 15, 1899.  
Received from R. A. Wells Lumber Co.,  
S. W. Cor. Clark and 22nd Sts., 2743 ft.  
1" walnut:"

that the lumber was unloaded in defendant's yard; that after same had been unloaded and tallied by defendant's drayman, either the defendant himself or his tallyman wrote on the ticket the figures "2743:" that thereafter the delivery ticket was returned to the driver Lindgren, by the defendant, with the following written upon it by the defendant: "This lumber is to be \$45.00 per M ft." and below these words the signature "J. Dunfee;" that the said Lindgren delivered the said ticket to Wells; that the lumber had never been paid for; and that this suit was begun within ten years from date when the cause of action accrued.

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There was a controverted question of fact with reference to the circumstances under which the lumber was left at defendant's yard. On the one hand, it is claimed by Wells that on talking to defendant over the telephone, defendant complained that the lumber was not worth \$35, but that he could use it at \$45; that he (Wells) assented thereto and told him to have the driver unload it. He is corroborated in his claim by the driver's testimony to the effect that defendant told the driver when he arrived, that the lumber was worth only \$45; that Wells was called on the telephone from the defendant's office; that defendant had a conversation with Wells on the telephone about the lumber.

Defendant, on the other hand, claims that he refused to take the lumber; that he had no agreement with Wells over the telephone to take the lumber at \$45; that he instructed both Wells and the driver to have the lumber taken back to the plaintiff's place of business; that the driver left it because he had to go elsewhere; that thereupon defendant had it tallied; that he never used it; that on moving away from the premises the lumber was left there; and that that was the last he had seen of it.

The only other controverted question of fact in the case was, whether or not a new invoice had been sent from plaintiff to defendant, showing the price to be \$45 per one thousand instead of \$35 per one thousand feet.

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

Following the decision of the Appellate Court in the previous trial of the same case, the trial court below found that the instrument offered in evidence was such an evidence of indebtedness in writing as to allow an action to be maintained under Section 17, Ch. 83, R. S., which provides: "Actions on bonds, promissory notes, bills of exchange, written leases, written contracts or other

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evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrues. \* \* \*

Mr. Presiding Justice Gridley, in passing upon that question said:

"We do not agree with counsel for defendant in his contention that the instrument is 'merely a receipt evidencing performance of a prior executed oral contract.' It is something more. After defendant had had his talk with Wells over the telephone, in which, as above stated, defendant told Wells he would pay \$45 per thousand feet for the lumber, and in which Wells told the defendant that defendant could have the lumber for that sum per thousand feet, defendant did not merely sign his name to the delivery ticket and hand the same to the driver, but he wrote on said ticket the words 'this lumber is to be \$45.00 per M ft.' and then signed his name underneath. We think this is such an evidence of indebtedness in writing as is contemplated by the statute. On the face of this instrument we find the names of both plaintiff and defendant, the subject-matter, viz: 2743 ft. 1" Walnut lumber, the amount to be paid, viz: \$45.00 per M ft. and the date of the sale, viz: Sept. 16, 1899, and that the lumber sold has been received by the defendant on the date mentioned. It is true that on this instrument it is not disclosed when the lumber is to be paid for, but the law will presume in such a case that payment is due at the time of the delivery of the lumber. Matz v. Albrecht, 52 Ill. 491."

This decision was determinative of the first point raised by the defendant in his affidavit of merits.

In the present case defendant admitted having written the words, "This lumber is to be \$45 per M ft." upon the delivery ticket, and also that the signature on the ticket below these words was his. This fact at once disposes of the fourth point set forth as a defense in the affidavit of merits, and also has an important bearing upon the second and third points therein. This admission is not only strongly corroborative of the plaintiff's testimony as to the character of the telephonic conversation had with the defendant at the time the lumber was delivered, but is pointedly contradictory and irreconcilable with the defendant's version of said conversation. When we also take into consideration the further corroboration of plaintiff's testimony by that of the driver, we are of the opinion that the court was warranted in find-

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ing the issues raised by the defendant in said second and third points in favor of the plaintiff.

The only question remaining is, whether or not the court erred in allowing interest upon the amount of the claim. While we appreciate what counsel for defendant has stated in the course of his brief as to the fact that the large amount of the interest was due to the delay on the part of plaintiff in bringing his action, yet that argument is not controlling here. As we see it, this is not a matter of discretion for the trial court or for this court, but is a matter that is governed entirely by the statute, and its interpretation by the courts of our State.

Mr. Presiding Justice Gridley, in his opinion in the previous case, has held that the evidence of indebtedness in writing was in effect a written contract.

This being the fact, then Section 2, Chap. 74, R. S. of Illinois, applies. This section permits recovery of interest on moneys after they become due "on any bond, bill, promissory note, or other instruments of writing. \* \* \*

Our Supreme Court has held that interest may be recovered upon a contract in writing where the said contract had been performed and accepted. In this case we are of the opinion that the evidence of the indebtedness in writing relied upon by plaintiff meets that requirement. This question was determined in the case of Bauer v. Hindley, 222 Ill. 319. Mr. Justice Wilkin who delivered the opinion of the court, said (p. 323):

"The fifth instruction told the jury that if they found for the plaintiffs, in addition to the amount due they should find interest at the rate of five per cent from the date it became due. It is insisted that the plaintiffs were not entitled to interest at all. As before said, the evidence shows the contract was in writing, and the finding is that it had been substantially performed and accepted by the appellant. The account was due and unpaid, and therefore, under the express provisions of the statute, the appellant was liable for interest."

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1863. It is a very long letter, and it contains a great deal of information about the state of the country at that time. It is a very important document, and it is one of the most important documents in the history of the United States.

WINFIELD SCOTT DODGE,  
Defendant in Error,

vs.

CHICAGO CITY RAILWAY CO.,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

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MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This is an action brought by Winfield Scott Dodge, defendant in error and hereinafter referred to as plaintiff, against the Chicago City Railway Company, plaintiff in error and hereinafter referred to as defendant, for injuries sustained by him in a collision between the wagon which plaintiff was driving and an east bound Root-3-43rd street car, on March 26, 1912, at about 9:45 in the evening, at a point about midway between street intersections.

The jury found in favor of the plaintiff and assessed the damages in the sum of \$500, upon which verdict judgment was entered by the trial court.

Defendant in its statement of the case sets forth four points upon which it relies for securing a reversal of the judgment:

First. That plaintiff was guilty of contributory negligence.

Second. There was a failure to prove the defendant negligent as charged in the statement of claim.

Third. The verdict and judgment is against the clear weight of the evidence.

Fourth. The court committed prejudicial error in ruling upon the admissibility of testimony.

No error is assigned to any ruling of the court in the admission of the evidence and no objections were made to the charge of the court; in fact, the argument of the defendant is devoted to the proposition that the verdict is not justified by the evidence: first, because the plaintiff was guilty of such contributory negli-

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gence as prohibits his recovery; and second, there was no negligence in the management and operation of the car.

A determination of this proposition involves a discussion of the evidence.

Plaintiff was the principal witness on his own behalf. He testified that on the evening in question he had loaded his wagon in the barn of his employer; that the wagon was a box wagon weighing about 3350 lbs.; that the box part of the wagon was about 14 ft. long, and the tongue about 10 ft. long, - making 24 ft. overall; that the load on the wagon weighed about 7500 lbs.; that the barn in which the wagon was loaded is situated on the south side of Root street, midway between Wallace and Butler streets, and sets back about 47 ft. from the building line; that on either side of the open space in front of the barn there are dwellings extending up to the sidewalk; that this wagon was to be driven to another barn of the employer of the plaintiff, which barn is situated so that when plaintiff left the tracks in front of the barn he had to turn west in order to reach his point of destination; that at a quarter of ten he took his seat on the box of the wagon and drove straight north out of the barn; that when his wagon was still on the sidewalk and his horses were in the space south of the south rail of the east-bound track, the horses' heads being about five or six feet from the rail, he turned and looked in either direction for the approach of a car and saw one approaching from the west, east-bound, at Wallace street; that the street in front of the barn and in the immediate vicinity was covered with snow, and immediately adjacent to the end of the sidewalk the snow was piled up about two feet high and two or three feet wide, and that the street was in a slippery condition; that after seeing the car 300 feet away he proceeded in a northerly direction with the intention of turning west; his testimony on that point being that he



drove "right straight, as far as I could, for to make the swing;" that when the car struck his wagon he was knocked down and landed on his head between the horses; and that thereafter he knew nothing until he was in the barn from which he had started, where he had been carried immediately after the accident.

Another witness on behalf of the plaintiff, - a man by the name of O'Brien - testified that he was on the car in question; that he had gotten off at the alley between Wallace street and where the barn is located, a distance of about 135 ft. west of the barn; at that time the car was going pretty nearly full speed (the motorman testified that the maximum speed of the car was 11 or 12 miles per hour;) at that time he noticed the wagon crossing the tracks, and that its front wheels were on the eastbound track, namely, the one upon which the car was approaching. He also testified that the car struck the wagon on the hind end.

Another witness offered by the plaintiff was a man by the name of Laib, also a passenger on the car in question, and who at the time of the accident was on the front platform. He said he saw the wagon when the car was still at Wallace street; that as the car approached the wagon it was going fast; that the motorman in no way changed its speed before it struck the wagon; that it hit the hind portion of the wagon.

Defendant placed upon the stand the motorman and two witnesses who were on the front platform of the car with the motorman.

The motorman testified that he stopped his car at Wallace street to take on passengers; that he then continued east, and at the time he first saw the wagon his car was traveling at a speed of about 10 miles per hour; and he further testified that when he first saw the wagon, the horses were about 15 ft. south of the walk.

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Root street, which runs east and west, at this place is 40 feet wide; the distance from the sidewalk to the east-bound track is about 15 feet. The motorman testified that when he first saw the horses at that place, viz: 15 feet south of the walk, his car was about 35 or 40 feet away; the other two <sup>other</sup> witnesses for the defendant also testified that when they first saw the wagon, the car was 35 or 40 feet away. One of the witnesses placed the heads of the horses at that time 10 or 12 feet south of the east-bound track, while another witness placed them almost as near the track. (The motorman did not state just where the wagon was struck; the other witnesses were not certain, but placed it further in front than the hind wheel.)

Defendant contends that plaintiff was guilty of contributory negligence, for two reasons; first, in going upon the tracks after seeing a car 300 feet away, and second, having seen the car and having proceeded on the tracks, <sup>he</sup> did not look again; arguing that if he had he would have seen the car approaching and could have urged the horses onward so as to get out of the path of the moving car; that not having done so, he was not exercising ordinary care for his own safety; and that though the defendant was guilty of negligence, this action on the part of the plaintiff contributed to the accident, therefore he cannot recover.

The jury by their verdict found that the plaintiff was in the exercise of ordinary care, and that the defendant was guilty of the negligence as charged in the plaintiff's statement of claim. Were the jury warranted in coming to that conclusion from the evidence

We will first consider the defendant's contention that the plaintiff was not in the exercise of ordinary care.

It is one of the agreed facts in the case, that the distance from Wallace street to the scene of the accident was 300 feet. When the plaintiff drove his wagon out into the street, with

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the horses near the south rail of the east-bound track, the car was then at Wallace street, 300 feet away; it was not a car coming at a fast rate of speed that he saw, but a car starting to come on slowly, because all of the witnesses of the defendant so testified. The motorman and the driver of the wagon were in plain view of each other. The horses at this time were pulling a load, including the weight of the wagon, of nearly six tons. Plaintiff continued to drive ahead, and had almost cleared the track with his hind wheel when his wagon was struck by the car. He was lawfully upon the street at the time. When he started to cross the track the car was almost a half block away. The condition of the street was such that he had to use the track. Snow was piled on either side of the street, and the entire roadway was slippery. Under these circumstances his attention might reasonably be expected to have been given to the horses in maintaining a footing and properly guiding them. Can we say, as a matter of law, that twelve minds cannot reasonably differ as to whether or not a man in the exercise of ordinary care would have done as plaintiff did on the night in question? We believe not; in fact, if we did, we would be invading the province of the jury. In the case of Chicago & Joliet Ry. Co. v. Manic, 230 Ill. 530, 533, the court said:

"It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonable, prudent person would do for his own safety, under like circumstances, must be left to the jury as one of fact. Negligence does not become a question of law alone unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so."

Many cases have been cited by counsel for either side, and defendant relies in the main on the case of Lee v. C.C. Ry. Co., 127 Ill. App. 510. The facts in that case are not similar to those in the case at bar.

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The case of G.U.T. Co. v. Jacobson, 217 Ill. 408, has been cited by both plaintiff and defendant: however, it is a case that distinctly favors the contention of the plaintiff. In that case, as in this, the accident occurred in the middle of the block between intersections. The contention of the defendant in that case was, that the plaintiff had testified that when he turned his horses onto the track he knew the car would inevitably have to strike the wagon unless the motorman slowed down or stopped the car; and the court stated that certain parts of the testimony of the plaintiff might justify such inference. The court, however, further said:

"But appellee (i.e. plaintiff below) also testified that when he turned his team to cross the track the car was about one hundred feet east of Whipple street: that said street was about two hundred feet east of him, and that he thought he had time to get across the track. He was bound to exercise a reasonable judgment in view of all the circumstances, and the court, in passing on the motion, was required to consider all the evidence, including the distance of the car from the wagon, the rate of speed, and all the circumstances. We cannot say that in so considering it the evidence necessarily led to but one conclusion, but we think that the question whether, under all the circumstances, appellee believed, upon reasonable grounds, that he had time to get across the track before the car would reach him, was proper to be submitted to the jury."

The facts in the case just cited are more favorable to the contention of defendant than are the facts in the case at bar.

Defendant further maintains that plaintiff failed to prove it guilty of negligence as charged in his statement of claim. We have fully set forth the facts testified to by plaintiff and his witnesses.

Let us further take into consideration the situation presented by defendant's testimony. The motorman stated that when he first saw the wagon, the horses were 17 feet south of the walk, at which time his car was 35 or 40 feet away and going at a speed of about 10 miles per hour. He would have the jury believe that the plaintiff drove his wagon, measuring 24 feet overall at a walk, from the point where the motorman first saw him, across the walk,

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across the pavement of the street south of the east-bound track, across the east-bound track itself, and nearly clear that track, - and that while he was going this distance, at a walk, which is approximately 40 or 50 feet, this car, although it had slowed down to four miles per hour at the time of the collision, went only 35 or 40 feet. The jury may well have doubted the reasonableness of any such theory.

This question of the defendant's negligence, as well as the question of whether or not plaintiff was in the exercise of ordinary care at the time of the accident, were clearly questions of fact for the jury to determine. The court's charge fully presented to the jury the law as applied to the facts. We cannot say as a matter of law <sup>or fact</sup> that the verdict of the jury was manifestly contrary to the weight of the evidence.

finding no reversible error, the judgment of the Municipal Court ~~is~~ affirmed.

AFFIRMED.





E. E. BENT,  
Appellee,  
vs.  
SAMUEL SLADE,  
Appellant.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 105

Plaintiff's statement of claim begins as follows:

"Plaintiff's claim is for the amount due upon a certain contract between the plaintiff and the defendant, providing for the erection by the plaintiff of a certain house for the defendant, said house being situated in Highland Park, Lake County, Illinois."

The contract is then set out in full. This statement also sets forth the contract price, the payments made thereon, the claim for extras; making a total of \$1117.19 which plaintiff claims there is due him from defendant. The statement of claim ends as follows:

"And the plaintiff further says that on 19th day of June, 1900, an account was had between the plaintiff and the defendant, and that it was agreed that there was due to the plaintiff from the defendant the sum of \$851.50, which said amount defendant then and there agreed to pay."

The affidavit of the plaintiff attached to the statement of claim sets forth the amount as \$933.09.

Defendant filed an affidavit of merits and set-off; he denied that there was any sum whatsoever due plaintiff; maintains that he had performed his part of the contract, but that plaintiff had failed in his duty as provided by the contract, in that he had constructed the house negligently and in an improper, inefficient,

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unsafe, unworkmanlike and insanitary manner, furnishing poor, low-grade, improper and second-class material, without regard to the plans and specifications, to the damage of the defendant of \$2957.68.

<sup>also</sup> Defendant denied that he had struck an account with plaintiff on June 18, 1909, and had agreed that there was due to plaintiff the sum of \$851.50 or any sum whatsoever.

The contract out of which the controversy originally arose was entered into between the parties on December 21, 1908, which contract provided that the plaintiff, E. M. Hent, as the contractor, would, on or before May 15, 1909, provide the labor and materials of the best of their respective kinds, and erect, complete and deliver in the most workmanlike and substantial manner, the entire work required in the erection of the residence for the defendant, Samuel Blade, in the City of Highland Park, Lake County, Illinois, according to plans, drawings and specifications made and prepared by J. L. Silabee, the architect. It provided further that the contractor shall be liable and required to respond to the owner for or by reason of any defective or unskillful work or labor done, or any defective or improper material used in performing or executing the same by the contractor, or for or by reason of any other non-fulfillment of the provisions of the contract, or for any loss or damage resulting therefrom, the supervision of the architect to the contrary notwithstanding.

Plaintiff contends that the house was ready for occupancy May 18, 1909, while the defendant denies said fact. However, defendant and family moved into and occupied the house on May 29, 1909.

During the progress of the work some differences arose between plaintiff and defendant, and in April, 1909, an arbitration agreement was prepared between plaintiff, defendant and J. L.

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Silabee, the architect, but was not signed at that time. This agreement, after setting forth the parties thereto, <sup>reads</sup> as follows:

"WITNESSETH: Whereas disputes and differences have arisen and are still subsisting or that may arise prior to the completion, as evidenced by the house being occupied, between the said parties relative to certain matters in connection with the said contract; written copies of which matters in controversy said parties to this agreement severally and mutually agree to submit on completion of work; now, therefore, it is hereby agreed that the said disputes and differences shall be referred and the same are hereby referred to the arbitration and determination of three arbitrators."

Then the agreement provided further for the appointment by each of the parties, of an arbitrator; it provided <sup>and</sup> also for the production of papers, plans, etc., the right to examine the parties; <sup>and</sup> the closing paragraph being as follows:

"Parties hereto agree with each other that he will not bring or prosecute any action in court against the other or against the arbitrators concerning matters in difference or any one of them, except by award of the arbitrators."

This original agreement bore date of April 5, 1909; <sup>and</sup> it provided that the award of the arbitrators shall be made on the 15th of May, but this was stricken out and there was substituted therefor the 25th of June. The agreement was not signed, however, until the 5th day of June, 1909, and in the agreement that was signed, the words "except by award of the arbitrators," were erased.

On the 18th of June the arbitrators made their award in writing; said award set forth that they had heard the testimony of the parties on the 17th day of June and found a balance due from defendant to plaintiff, of \$831.50; <sup>as</sup> the findings <sup>to</sup> the controversy between the architect and defendant is not in question. This award was signed by the respective arbitrators.

On the 9th of July, 1909, - nearly a month thereafter - plaintiff brought an action against the defendant in the Municipal Court, and in his statement of claim set out the award under the arbitration agreement, and failure of defendant to comply with the

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agreement to pay said award; this suit was based directly upon the award. Defendant, in the affidavit of merits to the controversy, claimed that the plaintiff had rejected, canceled and refused to be bound by the said arbitration and the awards thereunder, consequently it was not binding on the defendant.

In that proceeding a non-suit was requested by the plaintiff, and granted on November 28, 1911. The next day, - November 29, 1911 - this suit was instituted, and the statement of claim in the case at bar begins in this way: "Plaintiff's claim is upon a written contract for the erection by the plaintiff for the defendant of a house in Highland Park, Illinois;" while the affidavit of claim in the previous case began, "Plaintiff's claim is for the amount of a certain award dated June 18, 1909, and made by the arbitrators under a certain agreement entered into between plaintiff, defendant and one Silabee."

*Upense the*  
When this second case was called for trial, after the original contract, plans and specifications had been introduced in evidence, plaintiff offered the arbitration agreement dated June 5, 1909, in evidence. Objection was made to the introduction of this arbitration agreement on the ground that it was at variance with the plaintiff's statement of claim, that this suit was based upon the contract and not on the award; that the previous suit to which reference has already been made, had been instituted on the award and plaintiff had taken a non-suit. The objection was overruled. Counsel for defendant then asked for a continuance, on the ground of surprise; that the statement of claim indicated a reliance on the original contract; that he had prepared to defend against such a claim and to prove this claim of set-off previously filed; that he was not prepared to defend against a statement of claim that relied on the award under the arbitration agreement. This motion was overruled.





Plaintiff then proceeded to call two of the arbitrators, - Charles E. Pope and Louis E. Hart. They both testified generally as to what took place before the arbitrators. In addition, Mr. Hart testified that in a conversation between himself and defendant, that defendant stated he was satisfied with the award so far as he and the plaintiff were concerned, and that he would pay Mr. Bent the amount of the award.

The testimony given by these two witnesses with reference to what occurred at the time of the arbitration meeting, and this conversation between defendant and Mr. Hart, was all objected to for the same reasons that the award itself was objected to.

At the conclusion of plaintiff's case, counsel for defence filed a written motion for a continuance, supported by an affidavit made by himself, wherein he set forth in detail the facts upon which he relied for a continuance, and which had been urged at the time the motion was originally made; motion for continuance was again overruled, and the cause ordered to proceed. Defendant then put in his evidence, as outlined in his affidavit of merits and claim of set-off, which included evidence of damages which the defendant had sustained by reason of defective construction and improper material used in the building of the house.

The damages which defendant proved in the trial, which was at first admitted in evidence, was in the amount of \$1951.38. At the conclusion of defendant's case, defendant also introduced the record of the proceedings in the Municipal Court in the previous case, and again moved for a continuance of the cause, and offered another affidavit in support thereof. In addition to the reasons set forth in the previous affidavit, defendant set forth the fact that he expected to show by a witness who was then suffering from the effects of an accident and who could not be present in court, that the plaintiff had repudiated the award, and that therefore he

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should be given an opportunity to secure the attendance of this witness. This motion was also denied, and exception taken to the court's ruling.

Defendant then moved for an instructed verdict for \$1276.58, which amount was reached by deducting from the amount of damages he had sustained, the sum of \$450 which defendant admitted was still due on the contract, and \$224.82 for extras. This motion was denied by the court.

Plaintiff then moved to strike out all the evidence offered by defendant with reference to the damages sustained by reason of the failure on the part of the plaintiff to comply with the provisions of the building contract; which motion was granted over the defendant's objection. Plaintiff also moved for an instructed verdict upon the award under the arbitration agreement; which motion was also granted over the defendant's objection. Under the instructions of the court the jury returned a verdict for \$985.50 in favor of the plaintiff. Upon this verdict judgment was entered by the Municipal Court, <sup>from which</sup> ~~the~~ judgment order this appeal has been prosecuted.

*Plaintiff appeals.*

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

Although many errors have been assigned by defendant, we need concern ourselves, however, with but two:

First: Under the statement of claim, was plaintiff entitled to base his action upon the award of the arbitrators under the agreement of arbitration signed June 5, 1909. Was not the statement of claim worded in such a way as to lead the defendant to believe that the plaintiff in this case based his claim upon the contract alone; and did not the affidavit of merits filed by defendant show that the defence and set-off was based upon the theory that the plaintiff was endeavoring to recover on the contract, and not on the award, and therefore should not the court have granted the defendant's motion for a continuance because of surprise?

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Second: Granting that plaintiff had the right to have the benefit of the award offered in evidence in support of his claim, to the extent of the award, yet was not the statement of claim such as to permit the defendant to set-off against the award his claims for damages arising under the contract, at least those damages that accrued to him after the award was made under the arbitration agreement?

We will take up these questions in the order presented.

As far as the issue presented itself to the trial court, before the evidence was introduced, one could not readily read from the statement of claim the fact that the plaintiff depended upon the award made under the arbitration agreement of June 5, 1909. It is only when the award for \$831.50 is introduced in evidence, which with interest thereon at five per cent. from June, 1909 to November, 1911, amounts to \$995.50, - the amount of plaintiff's affidavit - that one can see from the statement of claim any connection with the award.

We can see no reason why plaintiff, if he depended upon the award, should not have expressly so stated in his statement of claim just as he did in the suit instituted by him July 9, 1909. For some reason he thought it to his advantage to so word his statement of claim so as to leave it in doubt as to what his real claim would be.

The purpose of the statement of claim is to give the defendant an opportunity to prepare his case for trial and to meet the contention of the plaintiff. Under a claim of account stated, the defendant might well believe that it was the intention of the plaintiff to show that between the plaintiff and defendant an account was struck, i.e. a claim made and an acquiescence therein. That such was the situation defendant denied in the affidavit of merits. If that was the situation, under such a theory of an ac-

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account stated, the evidence of Mr. Hart, one of the witnesses, that Mr. Blade, the defendant, said he was satisfied with the award made with reference to the claim of plaintiff, and that he would pay it, would make the award competent evidence to show the amount, independent of the rights of the parties under the arbitration agreement. Defendant's version of this conversation was that he would pay the award to Mr. Bent provided Mr. Bent, the plaintiff, would agree to make certain repairs which defendant maintained plaintiff had promised to make. Under such an issue of fact the court should not have instructed the jury to find for the plaintiff under the award, but the jury should have had the opportunity to pass on the question as to whether or not there was an account stated.

If that had been the theory under which the plaintiff had offered and the court admitted in evidence the award under the arbitration agreement, then the court would have been within his discretion in overruling the defendant's motion for a continuance. The plaintiff, however, offered the award in evidence on the theory that under the arbitration agreement the defendant had agreed to abide by the award; that the award fixed the amount due plaintiff from defendant, and that by the terms of the arbitration agreement, he had agreed to pay the same, and consequently the award constituted the account stated; the court received said award in evidence on the same theory. Such a theory, however, depends, not only on the award itself, but also on the arbitration agreement. The statement of claim filed in this case did not fairly apprise the defendant that such was the claim of the plaintiff.

The defendant or his counsel cannot be charged with lack of due diligence in not preparing to defend ~~xxx~~ against any such theory. We can see no good reason why the plaintiff should not have stated clearly that the claim of an account stated was based on the award and the arbitration agreement.

We realize the rulings of the court upon the question of motions for continuance are usually in the sound discretion of the court; yet we think the defendant in this instance was entitled to

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

2. Next, it is important to gather relevant information and data. This can be done through research, consultation with experts, or by analyzing existing data sets.

3. Once the information is gathered, the next step is to analyze it and identify the key factors that influence the outcome. This often involves using statistical methods or other analytical tools.

4. After analysis, the next step is to develop a plan or strategy to address the problem. This plan should be based on the findings of the analysis and should take into account the constraints and resources available.

5. The final step is to implement the plan and monitor the results. This involves putting the plan into action and tracking progress to ensure that the goals are being met.

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have his motion for a continuance granted, and that the refusal to grant the same was harmful error.

We believe a decision is also necessary on what we have pleased to call the second question in the case.

By the terms of the building contract, the house should have been completed May 15, 1909. As early as April, 1909, differences had arisen between the parties, and to adjust those differences without recourse to a court of law, an agreement had been prepared between plaintiff, defendant and the architect, Silsbee. Defendant went into possession of the building on May 29, 1909. A few days thereafter, namely, June 5th, the agreement to arbitrate was signed by all of the parties. The question arises, "What construction shall be given to the terms of the arbitration agreement?" Were the various matters in controversy submitted generally or specifically to the arbitrators by this agreement? Was there any limitation of the power given to the arbitrators under this agreement, in making their award, and if so, did the court's ruling upon the evidence in the case give the award greater effect than was warranted by the instrument of submission? The instrument of submission contained this clause:

"Whereas disputes and differences have arisen and are still subsisting or that may arise prior to the completion, as evidenced by the house being occupied, between the said parties relative to certain matters in connection with the said contract; written copies of which matters in controversy said parties to this agreement severally and mutually agree to submit on completion of work. \* \* \*"

What then was submitted to the arbitrators? All differences and disputes having arisen or that may arise. Has there been any limitation? We think so; namely, prior to the completion of the building. The question of completion would have been an issue unless somewhere in the agreement that question could be finally answered. The agreement itself provides the answer, - prior to the completion as evidenced by the house being occupied. In order

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to make certain just what disputes had arisen or might arise that should be submitted to the arbitrators, the agreement itself limited it strictly to those which had arisen or may arise prior to the completion as evidenced by the house being occupied.

The matters submitted were general in their nature and included any difference or dispute that existed between the parties, yet it was limited to such disputes and differences that had arisen or might arise prior to May 29, 1909, the date of occupancy, which for the purposes of the agreement for arbitration, marked the completion of the building.

Therefore the submission is specific as to time, but general as to the subject matter; consequently, with reference to any and all disputes and differences which had arisen or might arise, no matter of what character or nature, prior to May 29, 1909, the parties were bound by the award of the arbitrators, if fairly<sup>made.</sup>

Under the original building contract the parties had certain rights. The contract provided that the plaintiff shall be responsible to the defendant for any defective or unskillful work or labor done, or any defective or improper material used in performing or executing the same by the contract, or for or by reason of any other non-fulfillment of the provisions of the contract, or for any loss or damage resulting therefrom, the supervision of the architect to the contrary notwithstanding.

If under this contract, in the nature of things and in the ordinary course of human events, it was impossible for defendant to have known of the defective work done and improper material furnished, and the damages resulting therefrom, by May 29, 1909, the date of occupancy, should the defendant be denied the benefit of the provision of the contract which entitled him to hold the plaintiff for such damages, because of an arbitration agreement such as was entered into in this case, which by its very terms only

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submitted the differences and disputes which had arisen or might arise prior to the date of occupancy? This arbitration agreement did not provide that all future differences and disputes should be determined by an award thereunder, but was strictly limited to such differences and disputes which had arisen or might arise prior to May 29, 1909.

Employing the widest latitude in the construction of this agreement, we cannot extend its authority beyond that period of time. To hold otherwise would be simply to substitute the arbitration agreement for the entire original building contract, and this never was the intention of the parties.

The defendant offered evidence tending to show that he had suffered damages by reason of the failure on the part of the plaintiff to comply with certain provisions of the original building contract. He further introduced evidence tending to show that knowledge of that fact did not come to him, or could not have come to him until after the time limit set by the arbitration agreement, namely, May 29, 1909. We believe the defendant was entitled to have this evidence presented to the jury, and the action of the court in striking out such testimony and instructing the jury to find for the plaintiff on the award, constituted reversible error.

For the reasons above assigned, the judgment of the Municipal Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

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vs.

Appellant.

SUPERIOR COURT

COOK COUNTRY.

189 I.A. 109

tered, from which decree appellant has taken this appeal.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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At the time the bill of review was filed, appellant was the purchaser of appellee's property at the foreclosure sale under the original decree. On January 8, 1914, appellee herein filed in this court his motion to dismiss the appeal at appellant's costs, because the decree appealed from was interlocutory, and not a final order. The motion was, by this court's order of January 14, 1914, reserved to the hearing of this cause.

MR. JUSTICE PAR DELIVERED THE OPINION OF THE COURT.

The bill of review filed in this case sought to set aside the original decree because:

1st. That an error appears on the face of the decree in that the pleadings do not show and the decree does not find that at the time appellant's alleged claim for lien as a sub-contractor accrued, that appellee as the owner of the property was indebted in any sum to the original contractor.

2nd. Because it did not appear from the decree that all persons interested of <sup>whom</sup> ~~xxxxxx~~ appellant had notice were made parties to the proceeding.

3rd. Because it appeared from the decree that appellant had been fully paid for all cement furnished under its contract with the original contractor.

Several other reasons were urged, but these three were the main contentions of the petitioner in his bill of review. To this bill of review appellant filed his general and special demurrer, in which eleven special grounds of demurrer were set forth; ✓ which general and special demurrer was overruled. This demurrer admitted the facts in the bill of review, and consequently, when appellant elected to stand by his demurrer and refused to plead answer or demur further, the court entered a decree for the complainant.

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The chancellor found in his decree that the two main contentions urged in support of the bill of review were maintained. The court further ordered that the decree <sup>be</sup> re-opened and that said original suit be re-heard; that the sale of said property be set aside and the certificate of sale of the master to appellant be delivered up to the said master and canceled by him; that appellant amend its original bill by adding thereto the parties whose names are set forth by complainants in the bill of review, and to interplead and make parties to the original suit, all parties in <sup>in-</sup>terest in the subject matter of the said suit; and that the original cause, together with the cause created by the bill of review, be referred to a master to hear the evidence and proof de novo in said original cause; also hear the evidence and take proof on said bill of review; and any other material evidence offered by either of the parties to said suits; to take an accounting so as to ascertain whether there was any money or moneys in the hands of the appellee, due F. K. Brown & Company, the original contractor under the written contract, and whether any moneys were in the hands of appellee, subject to the alleged lien of the appellant, or to any alleged lien of any other sub-contractors or material men who may apply; and to make a full report to the court, of the findings on the judgment of said master in that behalf, as is required by law and as justice and equity may require, and to do any lawful acts necessary and proper in the premises.

The question arises: "Is this decree interlocutory or final as to the parties?"

The point is made by the appellant that when the court in the decree complained of ordered appellant to forthwith deliver up to the master its certificate of sale under the original decree and ordered the master to cancel said certificate, that thereby its rights had been finally determined.



Appellant, in making the purchase at a master's sale under a mechanic's lien decree, takes the same subject to any error that may have taken place in the proceedings leading to said sale.

This error may be reviewed, either by writ of error, appeal or by bill of review, depending upon the character of the error.

There is an additional answer to appellant's contention; the validity of the master's certificate of sale was dependent upon the decree in the original cause of action. The cancellation of the appellant's certificate of sale was only declaratory of the automatic working of the decree complained of. However, the bill of review did not merely ask ~~xxxx~~ for a setting aside of the original decree, but asked that the entire cause be reviewed and be reopened and reconsidered by the court. It asked that the allegations set forth in the bill of review be taken into consideration in connection with the issues in the mechanic's lien suit, that they may be considered together, and that a decree may be entered according to the facts as found upon a consideration of both the original cause of action and the bill of review. The bill of review was still in the control of the court; he had directed the master to take evidence with reference, not only to the bill of review, but the original mechanic's lien suit; and upon a final hearing the court may have re-established the parties in the status in which he found them at the time the bill of review was filed. In no way did this decree so finally establish the status of the parties in the bill of review and their rights thereunder, that when affirmed by the reviewing court the court had nothing to do but execute the judgment or decree that it had already entered, and the appellee be entitled to have such decree carried immediately into execution.

The case of Adamski v. Wieczorek, 170 Ill. 376, clearly settles the law on this question. The court had before it in that case several of the cases relied on by the appellant in its conten-

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tion that the decree complained of herein was a final one. On page 378 the court said:

"In this case, however, the rights of the parties in the matters in controversy had not been decided or settled by the decree opening the cause. The bill of review was still under control of the court, and upon final hearing the court might restore the parties to their former rights and again enter the decree set aside for the purpose of the rehearing, or such other decree as the evidence in the original cause and under the bill of review might require. The decree opening the original decree for a rehearing was interlocutory, merely, and not the subject of appeal or writ of error."

And so we have already found in this case, that there was no such finality as once and for all determined the rights of the parties under the issue made up in the bill of review and the original cause of action.

In addition to the cases cited by appellant which were considered by the court in the case of Adamski v. Wleczorek, supra, appellant has urged upon the attention of the court the case of De Grasse v. Gossard Company, 238 Ill. 73. This case does discuss at great length the question as to when a decree is interlocutory or final. The court in its decision quotes with approval from the language of the court in the case of Gray v. Ames, 220 Ill. 251, wherein it said (p. 254):

"A final decree is one which fully decides and finally disposes of the entire merits of the case. Some other order or decree of the court may be necessary to carry into effect the rights of the parties or some incidental matter may be reserved for consideration, which decision, either one way or another, cannot have the effect of altering the decree by which the rights of the parties have been declared."

By no possible process of reasoning can the decree of the complainant in this case come within the language hereinabove quoted. The court still had to make a finding as to the rights of the parties under the bill of review and the original cause; they stood undetermined; evidence had to be taken. As in the case of Adamski v. Wleczorek, supra, the court might restore the parties to their former rights and again enter the decree set aside for the

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purpose of the rehearing, or such other decree as the evidence in the original cause and under the bill of review might require.

Mr. Justice Carter, in his dissenting opinion in De Grasse v. Gossard Company, supra, cites the case of C. & N.W. Ry. Co. v. City of Chicago, 149 Ill. 141, wherein the court said(p.153):

"A judgment or decree is said to be final when it terminates the litigation between the parties on the merits of the case, so that, when affirmed by the reviewing court, the court below has nothing to do but to execute the judgment or decree it had already entered, and when the complainant or plaintiff is entitled to have the decree or judgment carried immediately into execution."

As we are of the opinion that motion of appellee to dismiss the appeal must be granted, and in view of the fact that perhaps this case may again come to this court for determination, we refrain from expressing an opinion upon the other questions raised on this appeal.

For the reasons hereinabove assigned, the appeal will be dismissed at appellant's costs.

APPEAL DISMISSED.

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INTER-OCEAN NEWSPAPER CO.,  
a Corporation,

Appellant,

vs.

CITY OF WEST HAMMOND, a  
Municipal Corporation,

Appellee.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

189 I.A. 110

STATEMENT OF THE CASE. This is an action brought in the County Court of Cook County by the Inter-Ocean Newspaper Company, a newspaper corporation and hereinafter referred to as plaintiff, against the Village of West Hammond, a municipal corporation and hereinafter referred to as defendant, to recover the sum of \$129.25 for certain printing done by appellant for appellee.

Plaintiff filed a declaration containing the common counts. At the end of the fourth count it <sup>used</sup> uses this language: "As will more fully appear from plaintiff's exhibit 'A' and 'B' hereto attached." The affidavit of amount due, <sup>which states the</sup> character of the claim, <sup>states that</sup> says the demand of the plaintiff in the above entitled cause <sup>is</sup> for money due plaintiff for printing, and after allowing all just deductions and set-offs, there is due plaintiff <sup>from</sup> \$129.25. The exhibits "A" and "B" <sup>are</sup> designated city warrants Nos. 476 and 1337, being respectively for the sums of \$15.30 and \$113.95, both purporting to be signed by the mayor and clerk of the City of West Hammond and directed to the treasurer of the said city.

To this the defendant filed a plea of general issue, and filed therewith an affidavit with reference to exhibit "B" which was for \$113.95. This affidavit sets up the fact that no appropriation had been made by the defendant, out of which payment could legally be made for the services and materials furnished the defendant, and for which plaintiff claims was issued the warrant designated as exhibit "B"; that neither the city council nor



any officer or agent of defendant had any authority or power to incur any indebtedness for which no provision had been made in the Appropriation Ordinances of 1909 and 1910, being the period of time in which these services were rendered; and that no such fund as a general fund exists or ever existed,

With reference to exhibit "A", the affidavit set forth that the warrant was regular and was a binding obligation.

Plaintiff's evidence ~~disclosed~~ <sup>showed</sup> that its claim was for printing and advertising furnished from December 10, 1909 to December 8, 1910, in connection with certain local improvements and special assessments made in the City of West Hammond under the Local Improvement Act, <sup>the 1908 & 1909 Act</sup> that in each instance the requirement of the Local Improvement Act had been complied with and special assessments levied for each improvement wherein advertising and printing had been furnished by plaintiff. It also appeared that the president and board of trustees of the Village of West Hammond had passed an ordinance duly authorizing said improvements and special assessments, and providing therein for the payment of all advertisements out of the special assessment fund, <sup>the</sup> ordinances themselves <sup>being</sup> were placed in evidence by plaintiff. It further appeared that the special assessments involved were passed between October, 1908 and May, 1910. The certificates of publication showing that the notice required to be given under the Local Improvement Act was published by plaintiff, were offered in evidence. The only other evidence submitted by plaintiff in support of its case was exhibit "B", which reads as follows:

"No. 1347 State of Illinois, Cook County. (\$113.95)  
City of West Hammond.  
City (Seal) City Clerk's Office, Feb. 15, 1912.  
Warrant.

Treasurer of said city.

Pay to the Order of The Inter Ocean One Hundred Thirteen and 95/100 Dollars for Printing Advertisements from Dec. 10/09 to Dec. 8/10 out of money in the Treasury not otherwise appropriated from the General Fund.

(Stamp)  
Central Trust  
Company of Illinois  
Collection

Ignatius F. Hankowski,  
City Clerk.

38571  
John Hessler,  
Mayor."

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The evidence offered by defendant was that the general appropriation ordinances passed as required by statute in the first quarter of each fiscal year by defendant during the years in which the printing was done, made no provision for the payment of the printing for which this suit is brought, and that any contingency fund, if any, provided by said appropriation ordinances had been exhausted prior to the bringing of this suit. (This evidence was admitted over the objection of plaintiff. The case was tried before a court without a jury. At the conclusion of the trial, plaintiff presented to the court and requested it to make three findings of fact; each of the two refused, requested the court to find the amount in dispute, as due the plaintiff. Judgment was entered for the amount admitted by defendant, namely, \$15.30, and denied as to the balance: <sup>the</sup> from which judgment this appeal is prosecuted.

*plaintiff's appeal.*

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

There is no dispute with reference to the facts in the case. There is a controversy, however, in applying the law to the facts. The plaintiff below, in its brief, argues that it based its case, first, upon an account stated, by introducing in evidence exhibit "B"; and, second, by showing the printing was done for defendant, and the value of same.

There is no denial by defendant that the printing was done as contended for by plaintiff, and there is no serious denial of the value of said printing. But it is insisted strenuously by defendant that plaintiff <sup>can</sup> not recover upon exhibit "B" or upon a quantum meruit.

The mere fact that in one of the counts, namely, the fourth count of the declaration filed by plaintiff, it refers to plaintiff's exhibit "A" and "B", does not add anything to the

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strength of the count; it does not change the character of the count, nor modify it. The mentioning of it in the declaration makes it no stronger than the introduction of it in evidence. The affidavit attached to the declaration is not based upon this exhibit. On the contrary, the affidavit states particularly that the claim is for printing done. The plea of general issue filed by defendant put in issue all the contentions made by plaintiff as set forth in its declaration. The filing of the affidavit did not change the character of the pleading or the effect thereof. It also set forth merely matter which was afterwards put in evidence.

The plaintiff introduced in evidence the ordinances.

Section 3 of the ordinance introduced provides as follows:

"That said improvement shall be made and the whole cost thereof be paid for by special assessment in accordance with an act of the General Assembly of Illinois, entitled, "An Act concerning local improvements," approved June 14, A.D. 1897 and amendments thereof and out of amount of said assessment when paid, the sum of \$378.30 (which sum does not exceed 3 per cent. of the amount of said assessment) shall be applied to payment of all lawful expenses and costs of making and levying and collecting and the letting and executing contracts of entire cost and expenses attending the making and return of the assessment roll and the necessary instalments, executions and advertisements, including court costs as provided by said act."

The claim of plaintiff was for advertisements in connection with the special assessments. This ordinance which was relied upon by plaintiff would not make the defendant primarily liable for any indebtedness incurred in and about the levying of said assessments. It provided specially the manner in which the indebtedness and expenses in connection with said assessments shall be met, and this is in accordance with the Local Improvement Act, as can be seen by a reference to sections 73, 90 and 94 of said Act.

Our courts have held that it is within the legislative authority of a city or village to thus fix the mode of payment in advance, by ordinance, and that while such ordinance remains in force, it is binding and excludes every other mode of payment.



This branch of the Appellate Court has so expressed itself in the case of City of Chicago v. McCartney, 172 Ill. App., 588, wherein the court held: (p. 593)

"It has been repeatedly held that it is within the legislative authority of a city or village to thus fix the mode of payment in advance by ordinance, and that while such ordinance remains in force, it excludes every other mode of payment." Hyde Park v. Corwith, 122 Ill. 441; People v. Hyde Park, 117 Ill. 438; Chicago v. Hayward, 173 Ill. 130; Chicago v. Shepard, 2 Ill. App. 802; Meeker v. Chicago, 98 Ill. App. 23; McCartney v. Chicago, 150 Ill. App. 275. \* \* \* In fact, after an assessment for local improvements has been levied and the improvement completed, a city has no power to change or prescribe another method of payment. City of Chicago v. Brode, 118 Ill. 528."

The defendant was but the trustee of the fund collected from said assessments for the purpose of meeting the indebtedness and expenditure incurred in connection with said assessments; and before plaintiff could recover from defendant under this ordinance, which was passed in accordance with the Local Improvement Act, it was incumbent upon plaintiff to show either that there were funds in the possession of defendant collected on the special assessment, in connection with which the services sued for in this case were rendered; or if the fund was no longer in the possession of defendant, that it had wrongfully diverted such fund for other purposes than for which it had come into its possession. This proof on the part of the plaintiff was a condition precedent to make valuable the evidence of plaintiff with reference to exhibit "B" and the work that was done.

It is axiomatic, that where a fund is in the hands of a person or corporation as trustee, to be expended in a certain manner, no action for a violation of such trust can prevail unless it is first shown as a condition precedent, that said sum of money or fund has come into possession of said person or corporation as trustee; or, having come into possession of said person or corporation as trustee, it had been used in a manner contrary to the conditions imposed in the creation of the trust.

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So in the case at bar. If the defendant was merely the trustee of these funds from special assessments, it was incumbent on plaintiff to show, first, that defendant had collected said fund and actually had the money in its possession: or, if no longer in its possession, that it had used the fund contrary to the purposes for which it had been collected. This principle was announced in the case of Village of Marysville v. Schoonover, 78 Ill. App. 189. This is evidenced further by section 89 of the City and Village Act, Hurd's Statutes of 1911, page 274, which provides as follows:

"All moneys received on any special assessment shall be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement."

Plaintiff failed entirely in this proof.

Plaintiff also contends that it has the right to recover upon the warrant, viz: plaintiff's exhibit "3." The defendant's liability on this theory is governed entirely by the law regulating the liability of defendant upon warrants issued by it upon its general funds. This differs entirely from defendant's liability in special assessment matters, where, as we have already stated, defendant is liable only secondarily, while it is liable at all on this warrant it is primarily liable.

This warrant (plaintiff's exhibit "3") standing by itself may be prima facie evidence of liability, but the mayor and clerk of the village of West Hammond had no power to issue said warrant, unless an appropriation therefor had been previously made. The evidence offered by defendant showed that no appropriation had ever been made to pay either the warrant or the claim. Without an appropriation covering this warrant, it did not bind the defendant. It was issued contrary to section 91 of the City and Village Act, Hurd's Statutes of 1911, page 273, which provides as follows:

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"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made. \* \* \*

We realize plaintiff contends it had furnished the printing in the advertisements, and that it should be paid the value thereof. but it was plaintiff's duty to inquire as to the power of defendant to enter into contracts and to issue warrants in payment of work performed or materials furnished under such contracts. If there are limitations in the power of a municipal corporation in that regard, a person dealing with such municipal corporation is charged with knowledge of such limitation.

In the case of May v. City of Chicago, 223 Ill. 595, which is decisive on this point, Mr. Justice Carter said, (p.599):

"It is contended that the city was bound by the city collector's promise to pay for the extra work. Section 91 of the City and Village Act (Murd's Stat. 1905, p. 309,) provides that no contract shall be made by the city council or any committee or member, and no expense incurred by any of the officers or departments of the corporation, unless an appropriation shall have been previously made. No appropriation having been made for this extra work of the plaintiff, it is impossible by any act of the city officials to create a liability against the city for the work. (City of Chicago v. Shober Lithographing Co., 8 Ill. App. 550; Trustees of Hookport v. Baylord, 61 Ill. 278; West Chicago Park Comm. v. Kincaid, 54 Ill. App. 113; Dillon on Mun. Corp. sec. 445.) A person dealing with a municipal corporation is charged with the knowledge of the limitations of the power of that corporation for any contract attempted to be entered into by any of its officials. Snyder v. City of St. Pulaski, 178 Ill. 397; City of Danville v. Danville Water Co., 178 Id. 299; Hope v. City of Alton, supra."

Finding no reversible error, the judgment of the County Court of Cook County is affirmed.

AFFIRMED.





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|-----------------------|---|---------------|
| CLARA HJERTAAS,       | ) | APPEAL FROM   |
| Appellee,             | ) |               |
| vs.                   | ) | CIRCUIT COURT |
| GAGE BROS. & COMPANY, | ) |               |
| Appellant.            | ) | COOK COUNTY.  |

189 I.A. 113

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment for \$2000 entered in a suit brought by Clara Hjertaas, appellee, hereinafter referred to as plaintiff, against Gage Brothers & Company, appellant, hereinafter referred to as defendant, in an action of trespass on the case to recover damages for injuries sustained in an accident that occurred at the northeast corner of Wabash avenue and Madison street.

Defendant, in its brief, assigns eleven errors upon which it relies. The fact remains, however, that the main contention of the defendant is that plaintiff failed to prove that she was in the exercise of ordinary care for her own safety at and just before the time of the accident in question.

On the day of the accident, October 14, 1911, about 2:30 in the afternoon, plaintiff, a woman about 22 years of age, was on her way to the Art Institute. Plaintiff testified that she was walking east on the north crosswalk of Madison street, crossing Wabash avenue, toward her destination; that she had proceeded nearly all the way over said crosswalk and was about a step or two from the east sidewalk of Wabash avenue when she was struck by the end of the wagon shaft of a wagon being driven by a man named David Williams, employed by defendant.

On plaintiff's behalf there were called four witnesses, who may be designated "occurrence witnesses;" two women and two men. The first of these witnesses was Harry W. Baskind, manager

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2. The second part is a description of the methods used in the study.

3. The third part is a description of the results of the study.

4. The fourth part is a discussion of the results and their implications.

5. The fifth part is a conclusion and a list of references.

6. The sixth part is a list of appendices.

7. The seventh part is a list of figures and tables.

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for a jewelry concern, who about the time of the accident had come from the place of business of Charles C. Graves, jewelers, at the southwest corner of Madison street and Wabash avenue, and was proceeding to the Kesner building, which is on the northeast corner of Madison street and Wabash avenue.

Another occurrence witness was Henry Heffner, who lives at 1448 86th Place, who conducted newspaper stands on the four corners of Madison street and Wabash avenue, and who had been in that business for about twelve years. Just before the accident he passed from the southwest to the northeast corner, and was on or about the northeast corner at the time of the accident.

The other two occurrence witnesses were, a Mrs. Beatrice Silverman and a Miss Ethel Jepson. The two were friends and at the time in question had been in the place of business of A. Starr Best, situated in the Kesner building, on the northeast corner of Madison street and Wabash avenue. Just before the accident they came out at the Wabash avenue entrance and walked south to the same crosswalk plaintiff was using at the time she was struck. They turned west, and were close to the north crosswalk of Madison street when the accident occurred.

While there are differences in their testimony as to some of the details as to where the horse and wagon was when they first saw it, and where plaintiff was when she was first seen, yet they are all agreed upon several important facts in the case, namely:

- (1) That at the time the plaintiff was struck, she was within one or two feet of the east sidewalk of Wabash avenue, practically at the curb, and that at that time she was walking;
- (2) that the horse and wagon came around the corner fast, or swiftly, - some using the word "fast," some "swiftly," and some saying the horse turned the corner at a speed of about eight to nine miles per hour;
- (3) that the horse was east of the east crosswalk of

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Wabash avenue when they first saw the horse and wagon, - at least three of them testified to this effect. We will have occasion later to refer to the testimony of these witnesses more in detail.

There was evidence offered as to the injuries plaintiff sustained, and her previous condition of health.

Defendant offered two witnesses; the policeman at the corner, and the driver of the wagon. The policeman testified with reference to certain regulations, as to when traffic proceeded in either direction; that one blast of the whistle permitted north and south traffic, and two blasts released the east and west; that just before the accident, he had given the signal for the north and south traffic to proceed, and when he did so he noticed defendant's horse and wagon about five feet east of the east crosswalk of Wabash avenue; that after about thirty seconds he gave two blasts of the whistle, also signalled for the traffic to come on from the east, and turned around to beckon the traffic from the west that it might proceed; and that as he turned from doing that, he noticed an accident had occurred, that a woman was lying in front of a horse and wagon near the curb at the northeast corner; that he then went over to the place of the accident, crossing in front of the horse on the crosswalk, and found plaintiff there; that he did not witness the accident itself, and that he took the name of the driver of the wagon.

The driver of the wagon, David Williams, states that when the signal was given for the north and south traffic, he stopped just east of the east crosswalk of Wabash avenue; that when the signal was given releasing the east and west traffic, he started ahead and turned at the corner of Wabash avenue going north; that he came around the corner on a walk; that as he turned at the corner, he saw the plaintiff, run around the front of a northbound car, i.e., he saw her come from in front of the car and he pulled



up on his horse; that she started back towards the car, then back towards the horse, and the left thill of the shaft struck her head about the ear; that she fell, and he jumped off his wagon; that when he jumped off the wagon his horse was right on the crosswalk.

The plat in evidence shows that Wabash avenue is 47 feet 9 inches wide from curb to curb; that the street car tracks occupy the center of the street, and an elevated railway structure and passenger station occupy the space overhead. Numerous pillars support the elevated structure and station; the distance on the north crosswalk of Madison street from the east rail of the east street car track to the curb is about 16 feet, and the distance from the same rail to the nearest pillar which is east of the track is 2 feet 3 inches in its east and west dimension; leaving a space of 10 feet between the pillar in question and the curb on the east side of Wabash avenue. The sidewalk on Wabash avenue from the curb to the building line is about 15 feet. The east crosswalk of Wabash avenue is correspondingly wide.

All the witnesses in the case who testified as to the position of the horse and wagon before the east or west traffic was released, place the wagon east of the east crosswalk; the testimony of the officer indicates that the wagon was at least 5 feet east of the crosswalk. Defendant's driver said he was just east, while the witnesses for plaintiff put him as coming from a point about 12 to 15 feet east of the east crosswalk of Wabash avenue. At least this fact is certain; that to any person walking east on the north crosswalk, before the whistle sounded releasing the east and west traffic, this wagon was about 30 feet east of the curb line of the east sidewalk of Wabash avenue.

Plaintiff testified that she was crossing Wabash avenue on the north crosswalk of Madison street, going directly east, on





her way to the Art Institute; that she had crossed the street car tracks, and was within a step of the sidewalk, when a horse and wagon ran into her; that she was struck by the shaft of the wagon nearest the sidewalk, namely, the right one; and that she was struck in the right ear and knocked down and afterwards stepped on and kicked by the horse.

Defendant contends that this testimony on her part constituted the only evidence bearing on the question of her exercise of ordinary care, and is not sufficient to support the allegation in the declaration that she was in the exercise of due care at and just before the accident. We agree with counsel that proof of the exercise of due care by plaintiff is essential to her recovery. But that fact may be proven like any other fact, not necessarily by direct or positive testimony, but it may be inferred from all the circumstances shown to exist immediately prior to and at the time of the injury.

We have already shown that the four occurrence witnesses who testified as to how this accident occurred were all in a position to observe both the plaintiff and the driver of defendant's wagon; she herself, and the other witnesses on her behalf, testified that she was within one or two feet of the east sidewalk when the accident occurred. The other four witnesses testified that they saw the wagon and horse east of the east crosswalk, about 10 or 12 feet, come swiftly across the east crosswalk of Wabash avenue on Madison street, and turn quickly around the north-east corner and strike the plaintiff.

Plaintiff had already crossed the street car tracks; in fact, she had already reached a position of apparent safety at the time she was struck, and it was only because of the act of defendant's driver in driving around the corner swiftly, and on the run, that the accident occurred and she sustained the injuries

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sued for. The place where plaintiff was picked up at the time of the accident, - close to the curb, namely, between the horse and the curb - supports her testimony as to the place she was at the time the accident occurred.

Against this testimony, defendant relies upon the evidence of David Williams, the driver, and Daniel McCarthy, the crossing policeman. In considering the driver's testimony, this circumstance is worthy of comment: That Williams is the only one of all the witnesses, who testified that his horse, in turning the corner at the time of the accident, was going at a walk, and that a car was passing at that time, going north, in front of which the plaintiff crossed at the time he first saw her.

The policeman's testimony is corroborative of Williams in but one point, namely, that after the accident occurred, the horse was still on the north crosswalk of Madison street, and that when he went to the scene of the accident, in crossing in front of the horse he was still on the north crosswalk.

There is testimony, however, on the part of the officer, which the jury might consider corroborative of plaintiff's theory. He testified that he gave the signal releasing the east and west traffic, by sounding his whistle twice; that he then waived with his hand for the traffic to come on from the east; that he then turned around to beckon the traffic to proceed from the west, and that when he turned back from doing that, he noticed an accident had occurred. When in connection with that testimony, one takes into consideration the fact that at the time the whistle was sounded for the east and west traffic the driver was at least 30 feet from the curb of the east sidewalk of Wabash avenue, the jury might reasonably infer from such testimony: (1) A quickness in the happening of the accident, which corroborates plaintiff's version; and (2) that the officer could not have given these

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signals with his hand to the east and west if a car had been passing to the north at that time.

Defendant admits in its brief, that there was evidence tending to show that its driver was guilty of negligence. On the last page of its brief it says: "In view of the testimony of various witnesses called by appellee, to the effect that the horse and wagon were driven around the corner at a speed of eight to twelve miles an hour, the evidence of course tends to show that appellant's driver was guilty of negligence, as charged."

Therefore, as we have said at the outset, the only contention of the defendant in this case was: (1) That the court should have instructed the jury to find for the defendant, as the evidence did not show plaintiff was in the exercise of ordinary care; and (2) that the court erred in refusing to grant a new trial because the verdict of the jury was against the weight of the evidence.

The defendant contends that plaintiff, in her testimony, did not go into details as to her every movement at the time of, and just before the accident, and failed to state that she looked or listened for a signal at that time; and further, that there was no other testimony on that point, and therefore, plaintiff failed in her proof, that she was in the exercise of ordinary care as alleged in her declaration. We cannot concur in such contention. Even if the evidence is silent on that point, that fact is not necessarily inconsistent with the exercise of due care on her part.

The case of Heidenreich v. Brenner, 280 Ill. 439, is much in point upon that question, and the facts in many respects are quite similar to the case at bar. In that case, as in the case at bar, the defendant strongly urged that plaintiff was not in the exercise of ordinary care, and therefore guilty of contributory negligence. The court said: (p.451)

1. *Introduction*

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"It has long been the settled rule in this jurisdiction that 'it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault or where the surroundings may excuse such failure.' C. & A. R.R. Co. v. Pearson, 104 Ill. 308; C. & E. I. R.R. Co. v. Schmitz, 211 Ill. 448; C. & J. E. Ry. Co. v. Wanic, supra; Wynn v. Cleveland C. & St. L. Ry. Co., 232 Ill. 132; Henry v. C. C. C. & St. L. Ry. Co., 236 id. 219."

The cases cited on that point by defendant are not controlling in the case at bar. In most of those cases the facts show a railway or street car accident; and even in those cases, the failure to look or listen is not negligence per se, and only becomes negligence as a matter of fact by reason of other attending circumstances which would indicate the necessity for a person's so doing. The case cited several times in the course of defendant's brief, is that of I. C. R.R. Co. v. Batson, 81 Ill. App. 142. An examination of that case shows, however, that the evidence, instead of tending to show ordinary care on the part of the deceased, strongly tended to show its absence.

We have no fault to find with the principle announced in that and the other cases cited by defendant, but they are not applicable to the case at bar, because they are so essentially different in the facts. The case at bar was not a railroad or street car accident. Plaintiff was at a crossing where she had the right to be. She had as much right on this crossing as any vehicle. There was nothing in the evidence to show that she had any knowledge, or in the exercise of ordinary care had any reason to believe that a wagon would come around the corner swiftly as she was about to step on the curb from the crosswalk; but the driver of the defendant's wagon knew that the east and west traffic had been released, and knew, or should have known by the exercise of ordinary care, that passengers might be crossing east and west at that time.

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2. The second part of the report is a detailed description of the methods used in the study. It includes a discussion of the experimental design, the data collection procedures, and the statistical analysis techniques.

3. The third part of the report is a presentation of the results of the study. It includes a discussion of the findings and their implications for the field of research.

4. The fourth part of the report is a conclusion and a discussion of the limitations of the study. It also includes a list of references and a list of figures and tables.

5. The fifth part of the report is a discussion of the implications of the findings for the field of research. It includes a discussion of the limitations of the study and a list of references and a list of figures and tables.

6. The sixth part of the report is a conclusion and a discussion of the limitations of the study. It also includes a list of references and a list of figures and tables.

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Counsel for defendant apparently proceeds on the assumption that the question of whether or not plaintiff was in the exercise of ordinary care must be proven by direct and positive testimony. Such is not the law. The degree of care exercised by either of the parties may be determined by circumstantial evidence, or it may be inferred from circumstances appearing in proof. The authorities are legion that to prove the fact that plaintiff was in the exercise of ordinary care it is not necessary to have direct and positive testimony, but it is only necessary that the jury may fairly infer from the circumstances in evidence, that plaintiff was in the exercise of due care. This principle is laid down in the case of C.C.C. & St. L. Ry. Co. v. Keenan, <sup>Adm.</sup> 190 Ill. 219, wherein the court said:

"The question whether Kerr was guilty of contributory negligence was a question of fact to be passed upon by the jury, and while the burden of proof was upon the plaintiff to show that Kerr was in the exercise of due care for his own safety, it did not devolve upon him to establish such due care by direct and positive testimony, but such due care might be inferred from all the circumstances shown to exist immediately prior to and at the time of the injury."

To the same effect is the case of North Chicago Street Ry. Co. v. Rodert, 203 Ill. 415, wherein it was held:

"It was not essential that it should be made to appear by what is called direct and positive proof, that either the appellee or the servants of the appellant company exercised ordinary care on the occasion in question. The degree of care exercised by each of these parties may be determined by circumstantial evidence, or, as has at other times been stated, may be inferred by the jury from circumstances appearing in proof. I.C.R.R. Co. v. Cragin, 71 Ill. 177; C. & A. Ry. Co. v. Carey, 115 id. 115; C. & E.I.R.R. Co. v. Beaver, 199 id. 34."

Another case directly in point is E. J. & E. Ry. Co. v. Hoadley, 220 Ill. 422.

We believe that the evidence in this case made it imperative for the trial court to submit the question of whether or not the plaintiff was in the exercise of ordinary care, to the

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jury. The court in its charge to the jury, gave many instructions on behalf of the defendant upon that question: in fact, in five different instructions did ~~not~~ the court bring home to the jury the contention of the defendant. The jury by their verdict found that the plaintiff was in the exercise of ordinary care, and that the defendant was guilty of the negligence charged in the declaration. The able trial judge who saw and heard the witnesses, did not disturb the verdict, but entered judgment thereon.

We cannot say that such verdict is manifestly against the weight of the evidence. On the contrary, we are firmly of the opinion that the jury were fully warranted in arriving at a verdict of guilty.

Defendant complains of two instructions that were refused, offered on behalf of defendant. The court gave on behalf of the defendant twenty instructions, and these instructions fully covered the subject matter contained in the two refused. We believe the jury were fully and fairly instructed on the law in the case.

Finding no reversible error, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

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WILLIAM HERR,

vs.

WILLIAM R. HENRIKSEN, et al.

BILL.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

HOLMES DISAPPEARING BED COM-  
PANY, a Corporation,

Appellee,

vs.

INTERVENING PETITION.

WILLIAM R. HENRIKSEN, et al.,  
on appeal of WILLIAM R. HENRIK-  
SEN,

Appellant.)

189 I.A. 115

STATEMENT OF THE CASE. A mechanic's lien suit was instituted by William Herr against William R. Henriksen, et al.; one of the parties defendant in the original bill was the Holmes Disappearing Bed Company. After the issues of the original bill had been referred to a master, the Holmes Disappearing Bed Company, a corporation, filed its answer in the nature of an intervening petition, to foreclose a lien claim of its own against certain buildings involved in the original proceeding. Subsequently the claims of Herr were settled, the original bill dismissed and Herr's lien discharged without prejudice to the Holmes Disappearing Bed Company. This state of the record left the issues in the case solely between the Holmes Disappearing Bed Company and the defendants. Hereafter we shall refer to William R. Henriksen, appellant, as the defendant, and to the Holmes Disappearing Bed Company, appellee, as the petitioner.

The real estate upon which the petitioner secured a lien by the decree complained of consisted of two double flat buildings located respectively at 530-532, and 630-632 South Highland avenue, being about a block apart. The petition for lien sets out the fact of this ownership in the defendant, and that the defendant requested the petitioner to furnish and deliver at said premises,

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for use therein, four certain disappearing beds, and four certain book cases and writing desks combined, for each of said double buildings; that a written contract evidenced the agreement between the parties.

M. H. Holmes, a witness on behalf of the petitioner, testified that he knew the contract was completed; that eight combination book cases and writing desks had been installed at the respective numbers on South Highland avenue; that the last work done on the job was on March 31, 1911; that that work was done by a man named Hilty, who went out and readjusted the beds and took care of a few incidentals, such as putting felt on the rollers, and readjusting the rollers; that on December 28, 1910, an invoice was sent to the defendant for the full contract price. There was also introduced in evidence, statement of claim for a lien filed in the office of the Circuit Court of Cook County, as claim #21457, of July 24, 1911. This constituted practically all the evidence that was taken before the master.

Frederick Hilty, who was also called as a witness, testified as to the work that he did on March 31st; he also testified that two doors and a spring were delivered to the office of the defendant in July.

The evidence offered by the defendant showed that the work had been completed in December of 1910; that on March 11, 1911, the petitioner received notes covering the amount of the contract price, which were sent to the Los Angeles office of the petitioner; and on March 28, 1911, these notes were returned to defendant with a letter stating that that method of settlement was not satisfactory, and asking that other arrangements be made in the near future to meet the obligation.

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The master in his report found that defendant was indebted to the petitioner in the sum of \$588, with interest thereon at the rate of five per cent. from the 10th day of July, 1911; and that he was entitled to a lien on the premises in question for that sum. Upon this report of the master, without hearing any further evidence, the court entered a decree, confirming and approving the report of the master. The decree found the same amount due and further ordered that the petitioner was entitled to a valid mechanic's lien. To the entering of this decree defendant excepted and prayed an appeal to this court.

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

Defendant contends that there is no evidence in the record to show that the beds, book cases and writing desks which are the subject matter of the Mechanic's lien suit, were in any wise attached to the building, or in any wise became fixtures either by actual attachment or by adaptation and use.

We have searched the record very diligently to discover any facts or evidence from which any reasonable inference might be drawn that would warrant us in arriving at the conclusion that the beds, book cases and writing desks were attached, adapted or used in the building so as to come within section 1 of the Mechanic's Lien Act, wherein it is provided that a lien shall be allowed in favor of persons who shall under conditions therein provided, "furnish materials, fixtures, apparatus or machinery for the purpose of, or in the building, altering, repairing, or ornamenting any house, \* \* \* or sidewalk, etc."

The petitioner urges that the contract furnishes evidence in support of its right to a mechanic's lien. Reference is made to the following language therein: "All furniture to be built

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according to measurements required for the Holmes disappearing bed of plain oak, in a first-class manner, and delivered to the building in the white (not stained or painted) exclusive of glass or hardware of any description; no doors to be fitted or hung, no hardware to be put on by us. (Meaning the petitioner.) \* \* \* Openings for the beds and recesses and the ventilation to be prepared by the contractor according to our details and instructions." (Meaning the details and instructions furnished by the petitioner.)

This language, the petitioner argues, indicates that the furniture, - meaning the eight disappearing beds, the book cases and writing desks, - were not portable in their nature, were not complete in themselves, but were like doors, consoles, mantels and other features of the trim of a building which are furnished to a building but not completed; that the work necessary to complete the finished product would be done by some other contractor along with the finishing of the other woodwork in the rooms where they are to become a part of the permanent equipment of the house. It argues also that the use of the word "install" in the contract indicates permanency.

But the petitioner is reduced to the extremity of arguing conjectures rather than facts that appear in the evidence. There was not a scintilla of evidence offered by petitioner which showed, or even tended to show, that these eight disappearing beds and the book cases and writing desks were permanently attached to the building, or that they had become fixtures, either by actual attachment or by adaptation and use. It is true, in the course of its argument, petitioner speaks of modern apartments, and that disappearing beds are a feature of them, and that they are permanent; but such argument is on matters de hors the record, and an argument of this kind can have no weight with this or any other

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1. *Introduction*

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4. 1990年12月15日，在“中国—东盟”贸易合作会议上，中国外经委副主任王毅表示，中国愿与东盟国家在平等互利的基础上，开展贸易合作，并愿与东盟国家在平等互利的基础上，开展贸易合作。

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reviewing court which must base its decision upon the facts in evidence.

Reference is also made by the petitioner, to certain evidence brought out in the testimony of one of the witnesses for the defendant, viz: that he saw men employed by the petitioner tear down some of the plaster, and argues from that fact that the fixtures were being attached to the wall. At best this would be a remote inference. Moreover, we are of the opinion that the contract itself furnishes damaging evidence against the petitioner's contention. The closing paragraph of the contract reads as follows:

"It is part of this agreement that the beds and recesses shall remain the property of the Holmes Dis-appearing Bed Co. until the amount is paid in full, and no right to the patents or licenses shall be granted until the beds are paid for in full."

Such language indicates that the petitioner, when it delivered the fixtures under this contract, did not intend to part with its title. It supports the contention of the defendant, that the petitioner did not regard that the installation of these fixtures in the premises in question proof of the fact that they were so attached to the real estate as to become a part thereof.

Petitioner in its brief has predicated its argument for affirmance of the action of the court in entering the decree, on the ground that substantial justice has been done, because defendant has not denied the amount of the indebtedness, and because the claim has not been paid. Petitioner pleads for an affirmance against authorities cited by defendant which, together with the Act itself, are controlling under the issues herein joined and the evidence submitted for our review. The petitioner does not in any way point out wherein the fixtures furnished under this contract can be considered as being that kind of material as is the subject matter of section 7 of the Mechanic's Lien Act. The

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decisions of the courts show the meaning of the word "material" in that section to be material such as lumber, sand, bricks, - all of the character which lose their identity after being used in connection with the building, but at once become a part of the whole structure.

While this section of the statute apparently provides that it is not necessary to prove that the material delivered for that purpose actually entered into and was used in the construction of the building, yet our Supreme Court does not wish to be understood as having decided that such is the effect of that provision of the statute; and there are decisions that hold that any presumption that arises from such interpretation may be rebutted by defendants in such mechanic's lien action.

The subject matter of the petition for mechanic's lien in this case cannot, by stretching the imagination, be considered that kind of material. Rather at once, however, do they come within the provisions of section 1 of the Mechanic's Lien Act, wherein it is provided that persons who shall under conditions provided therein, "furnish materials, fixtures, apparatus or machinery for the purpose<sup>of</sup>, or in the building, altering, repairing, or ornamenting any house," etc., shall be entitled to a lien.

To claim the benefit of the Mechanic's Lien Act under section 1, the petitioner must allege and prove that the things for which a lien is claimed were so attached to the building or improvement as to become a part of the real estate. This principle was laid down in the case of Haas Electric Co. v. Amusement Co., 236 Ill. 452, wherein the very question here under discussion arose. In that case the petitioner claimed the benefit of section 7 of the Mechanic's Lien Act. The court in that case was of the opinion that the things claimed to have been furnished for which a lien was sought, were not of such character as to be classed as material under

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section 7, but rather came under the broader provisions of section 1 of the act. In that case the court clearly set forth the limitations of section 7 and the comprehensive character of section 1, which provides that a lien may be established for things other than material, namely, for fixtures, machinery, apparatus, etc., and announced the principle that proof of the mere delivery of the fixtures, apparatus, and machinery was not sufficient to authorize a decree establishing a lien, without any proof ~~as~~ that such apparatus, fixtures or machinery were ever had in such manner as to become attached to or form a part of the real estate. In the course of its opinion, the court said, on page 482:

"The principle underlying the cases which limit the lien to the extent of materials actually used in the construction of the building is, that it is contrary to justice to burden real estate with liens to pay for chattels which in no sense could be supposed to enhance the value of the real estate, hence where a lien was sought to be established for fixtures, apparatus or machinery, it was necessary to allege and prove that the things for which a lien was claimed were so attached to the building or improvement as to become a part of the real estate."

This same principle was enunciated again in the case of Rittenhouse Co. v. Brown & Co., 154 Ill. 549, also in the case of Schmeling v. Rockford Amusement Co., 154 Ill. App. 308.

The case at bar clearly comes within the facts and the principle of law enunciated in the case of Haas Electric Co. v. Amusement Co., supra. There are no facts in the evidence, nor any findings of fact in the decree which entitle petitioner to a lien under the principles announced in that case. In fact, there was no evidence submitted from which the court could enter a finding of fact that the things for which the lien was claimed were so attached to the building or improvement as to become a part of the real estate, and consequently the court erred in entering the decree complained of.

For the reasons hereinabove assigned, the decree of the Superior Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

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ERROR TO

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MUNICIPAL COURT

ANDREW BICKEL.

Plaintiff in Error.

OF CHICAGO.

189 I.A. 116

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John F. Devine, administrator of the estate of Martin Podpecan, deceased, defendant in error (hereinafter referred to as the plaintiff), brought suit in the Municipal Court of Chicago to recover \$300 (with interest), loaned by the said deceased to Andrew Bickel, plaintiff in error (hereinafter referred to as the defendant), on September 9, 1909. It was alleged in the statement of claim that the defendant gave the deceased, at the time of the loan, a promissory note to evidence the loan; that the note had been lost; that it was never endorsed or transferred by the deceased, and that there was due on the same \$333; and the plaintiff offered a bond to the defendant in double the amount due, to hold him harmless from further payment of the said note, as by statute in such case made and provided. The defendant, in his affidavit of merits, admitted the making of the said note, and that the same had never been paid, and the defendant offered to pay the same upon production, cancellation and surrender thereof.

The case was tried by the court, without a jury. The plaintiff made proof tending to establish the loss of the note and then tendered to the defendant in open court an indemnity bond as provided for by section 14, chapter 98, Hurd's Rev. Statutes, in the sum of \$888, with sureties to be approved by the court, but the defendant refused to accept the bond. (The defendant does not contend that the bond offered was not a good and sufficient one, and

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conditioned in accordance with the provisions of section 14, chapter 98, Hurd's Revised Statutes. The court found the issues for the plaintiff and entered judgment on the finding, to which action the defendant excepted, and this writ of error followed.

The defendant contends <sup>to reverse the judgment, defendant, on account of error</sup> that the note in question was adapted to circulation by an endorsement thereon, and for that reason absolute proof that the note was actually lost or destroyed was necessary to entitle the plaintiff to a judgment; that the evidence in the case does not show absolutely that the note was lost or destroyed, nor that the deceased owned the note at the time of his death. The defendant further contends <sup>ed</sup> that the proof did not show that the deceased had not endorsed the note. / Independently of the contention that the proof does not show that the deceased owned the note at the time of his death (a contention we find without merit), the defendant's position amounts to this: that in an action upon a lost negotiable note, where the evidence does not show that the note was not adapted to circulation by an endorsement thereon, judgment will not be entered upon said instrument, unless the proof shows absolutely that the note was lost or destroyed. The position of the defendant seems to be supported by the following cases: Rogers v. Miller, 4 Scam. 333; McMillan v. Sethold, 35 Ill. 250. It must be remembered, however, that since the decisions in those cases, the legislature passed section 14, chapter 98, of Hurd's Revised Statutes. This section reads as follows:

"In any action founded upon any note, bond, bill, or other instrument in writing, or in which the same, if produced, might be allowed as a set-off in defense, if it shall appear that such instrument was lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set-off the same, he may, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of such note, bill or instrument,



with sufficient security, to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs, executors and administrators, against all claims by any other person on account of such instrument, and against all cost and expenses by reason thereof."

This section recognizes the right of one who has lost a note, negotiable or otherwise, of which he was the owner, to bring an action and recover upon it, and it empowers the court to protect the maker of the note by requiring the plaintiff in the suit to execute a bond properly conditioned to effectuate that purpose. Section 14 operated to change the rule announced in the case of Rogers v. Miller, supra; Fairbanks v. Campbell, 55 Ill. App. 218. There would be no reason or necessity for compelling a plaintiff to furnish the bond contemplated by section 14, if he was still compelled to prove absolutely the loss or destruction of the note. In the present case the plaintiff made out a prima facie showing as to the loss of the note and his ownership of the same, and he tendered to the defendant a good and sufficient bond to protect him against any possible loss growing out of any future claim by any third party upon the note. The defendant saw fit to refuse this bond. By this action, he made it unnecessary for the court to order the plaintiff to execute a bond, as contemplated by section 14. The plaintiff admits owing the debt. While the proof is not absolutely clear that the note is lost or destroyed, it is reasonably clear that it is lost. The defendant refused a tender that would have protected him against any possible future loss, arising out of the note, and he is in no position to complain that he may hereafter suffer a loss through the note.

There is no merit in the defendant's contention that the court erred in excluding certain evidence offered by the defendant.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.





CITY OF CHICAGO,  
Defendant in Error,  
vs.  
PAUL TOMANICKA,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 118

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Paul Tomanicka (hereinafter referred to as the defendant) was arrested by a police officer in the City of Chicago, for disorderly conduct committed in the presence of the officer. After the arrest, a complaint was filed in the Municipal Court of Chicago, charging the defendant with a violation of section 2012 of the Municipal Code of the City of Chicago, commonly known as the "disorderly conduct section." The defendant waived a trial by jury, and the cause was heard by the court. The court found the defendant guilty of a violation of the section of the ordinance in question, and assessed a fine against the defendant in the sum of one dollar. Judgment was entered on the finding and this writ of error followed.

The defendant asks that the judgment of the Municipal Court be reversed on two grounds: (a) that the evidence of the plaintiff, even if true, did not justify the finding of guilty; (b) that the finding of the trial court is manifestly against the weight of the evidence. We have read the entire record in this case, and we are satisfied that the plaintiff made out a prima facie case against the defendant. As to the second point, we cannot say that the finding is manifestly against the weight of the evidence.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.



EDWIN B. HARTS,  
Plaintiff in Error,  
vs.  
CITY OF CHICAGO,  
Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 119

STATEMENT OF THE CASE. This is an action of the fourth class, brought in the Municipal Court of Chicago, by Edwin B. Harts, plaintiff in error, against the City of Chicago, defendant in error, to recover \$200, interest alleged to be due upon certain deposits made by the plaintiff in error with the defendant in error for the purpose of having certain water pipe extensions made in Mozart Street, in the City of Chicago, by the defendant in error. On June 4, 1906, the plaintiff in error, for the aforesaid purpose, deposited with the City of Chicago \$1187.50, and on June 19, 1907, \$114.33, and he received from the defendant in error the following receipt or certificate of deposit:

\$1302.33 City of Chicago.  
Department of Public Works,  
Bureau of Engineering.

#1299.

June 19th, 1907, June 4th, 1906.  
WATER PIPE EXTENSION DIVISION.

It is hereby certified that Edwin B. Harts has advanced the sum of Thirteen Hundred and Two and 33/100 Dollars for the purpose of laying 980 feet of 8 inch water supply pipe in Mozart Street 320 feet south of 43rd St. to 45th St.

Section 1906 Revised Code: Whenever, upon a proper survey it is shown that a permanent annual revenue of ten (10) cents per lineal foot is being derived from such water mains so laid then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; provided, however, if the money so advanced, is not paid back within two years, interest at the rate of Three and One Half (3 1/2) per cent per annum shall be allowed after the expiration of such two years until paid.

Approved:-

John Erickson,  
City Engineer.

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Approved John J. Hanberg,  
Commissioner of Public Works,  
by Paul Redeski,  
Deputy Commissioner.

— L. Lucas,  
Supt. Water Pipe Extension."

On April 18, 1912, the plaintiff in error was notified by the City that a survey of the water extension in question showed a revenue to the City of 13¢ per lineal foot, and that the City would pay the said certificate of the plaintiff (in error) upon presentation of the same. The plaintiff in error presented the certificate to the City, and the City offered him a voucher for the amount of the principal advanced by the plaintiff in error, but it refused to pay him any interest on the same. The plaintiff in error accepted the amount of the principal under protest, and this suit was brought to recover interest amounting to \$230 alleged to be due on the total deposit made.

The case was tried by the court without a jury. The parties to the cause stipulated "that, during a period from 1905 to 1911, the City of Chicago had, in numerous instances, repaid to the holders of similar certificates the principal and interest at the rate of 3 1/2 per cent. per annum upon said deposits, the interest being computed in these other cases at a period beginning two years after the date of the deposit of the money with the City up to <sup>the</sup> date of payment, and that the City has done this in cases where a survey had not been made." The following ordinance of the City of Chicago was introduced in evidence:

"1903. Cost Advanced by Property Owners.) The commissioner of public works may extend water mains where the owners of the property, or persons desiring such extension, shall advance and pay into the city treasury a sum of money equal to the entire cost thereof; and whenever, upon a proper survey, it is shown that a permanent annual revenue of ten cents per lineal foot is being derived from such water mains so laid, then such money so advanced as aforesaid shall be repaid to the person or persons so advancing the same; Provided, however, if the money so advanced is not paid back within two years, interest at the rate of three and one-half per cent per annum shall be allowed after the expiration of said two years, until paid."

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4. *Journal of the American Medical Association*, 1990; 263: 1033-1036.

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5. *Conclusions*

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MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant in error contends "that interest does not begin to run on the deposit made with it by the plaintiff in error, unless the city fails to refund the principal within two years after a proper survey has shown that the pipes laid are earning a permanent annual revenue of ten cents per lineal foot." The plaintiff in error contends that interest begins to run on the deposit two years from the date of the same, without regard to the amount of the revenue being derived by the city from the said water pipe extension. The trial court sustained the contention of the defendant in error and entered judgment accordingly.

The Supreme Court of this State in the recent case of Merchants' Loan and Trust Company v. The City of Chicago, 284 Ill. 76, has passed upon the question now before us. The decision in that case sustains the contention of the plaintiff in error. The judgment of the Municipal Court must therefore be reversed, and as it is conceded that the amount of the interest the plaintiff is entitled to (should the contention of the plaintiff in error be sustained) is \$290, the judgment of the Municipal Court of Chicago will be reversed and judgment will be entered in this court in favor of the plaintiff in error and against the defendant in error for \$290 and costs of the suit.

JUDGMENT REVERSED AND JUDGMENT HERE  
FOR \$290 AND COSTS OF SUIT.

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MINNIE ZAHL and LOUISE ZAHL,  
Defendants in Error,

vs.

MARY A. ROBERTS,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

129 I.A. 121

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendants in error, Minnie Zahl and Louise Zahl, (hereinafter called the plaintiffs) sued the plaintiff in error, Mary A. Roberts, (hereinafter called the defendant) in an action of the fourth class in the Municipal Court of Chicago. In the statement of claim the plaintiffs charged that "the defendant, Mary A. Roberts, wrongfully, wickedly and feloniously conspiring with one Fred P. Roberts, her husband, to cheat and defraud the plaintiffs, induced them to deliver to her certain furniture then the property of the plaintiffs, of the value of, to-wit: Three Hundred and Fifty Dollars (\$350.00) and to accept in payment therefor the note of one Rudolph E. Hamann, an employe of the defendant, which said note the defendant well knew the said Hamann was and would be unable to pay, and was therefore worthless, but which the defendant and said Fred P. Roberts represented to the plaintiffs was good. And the plaintiffs aver further, that shortly thereafter the defendant sold the said furniture so wrongfully obtained by her, and received the entire proceeds of the said sale." The defendant filed an affidavit of merits specifically denying each and every one of the allegations of the statement of claim. The case was tried before the court without a jury, and the court found the defendant guilty, and assessed the plaintiffs' damages at the sum of \$350 in tort, and judgment was entered upon the finding. This writ of error followed.



*Defendant v. J. A. & J. B. & Co. Inc.*

The defendant relies for a reversal of the judgment upon the following errors: (a) that the finding and judgment is wholly unsupported by the evidence in the case; (b) that the finding is contrary to the weight of the evidence; (c) that the finding and judgment of the Municipal Court are contrary to the findings of fact made and the propositions of law held by the court.

We have carefully read and considered all of the evidence that was introduced in the case. There was testimony tending to sustain the charge in the statement of claim; and there was testimony tending to sustain the claim of the defendant that she was innocent of the said charge. The trial court saw and heard the various witnesses who testified, and had a very much better opportunity than we to pass upon the credibility of the witnesses and the weight that should be attached to the testimony of each, and we cannot say that the finding of the court is manifestly against the weight of the evidence.

The defendant strenuously insists that the finding of the trial court is inconsistent with and contrary to certain findings of facts made by the court. We have carefully considered this complaint, and we are of the opinion that it is without merit. The following propositions of fact submitted by the defendant and held by the court will serve to illustrate the present contention of the defendant:

"The court finds as a matter of fact that the defendant did not personally induce the plaintiffs to deliver to defendant any furniture nor to accept in payment for said furniture the note of Rudolph E. Hamann."

"The court finds as a matter of fact that the defendant did not induce the plaintiffs to deliver any furniture to the defendant."

"The court finds as a matter of fact that the defendant did not induce the plaintiffs to accept in payment of any furniture the note of Rudolph E. Hamann."

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In passing upon the present contention of the defendant, it must be remembered that she was charged in the statement of claim with conspiring with her husband to cheat and defraud the plaintiffs by inducing them, etc. It was conceded that the defendant did not personally induce the plaintiffs to deliver to the defendant any furniture, nor to accept in payment for said furniture the note of Hamann, but there was evidence to the effect that the defendant entered into a conspiracy with her husband to induce the plaintiffs to deliver to the defendant certain furniture and to accept in payment for said furniture the note of Hamann. There was also evidence to the effect that the husband, after the formation of the said conspiracy, and in furtherance of the same, personally induced the plaintiffs to deliver to the defendant certain furniture and to accept in payment for said furniture the note of Hamann. When all the propositions of fact and law, held and refused by the court, are considered together, it is clear that the court correctly understood the law governing the case. By holding the three propositions of fact before referred to, the court, in effect, found that the defendant did not personally induce the plaintiffs to deliver to the defendant any furniture nor to accept in payment for the same the note of Hamann. The court would have been justified in refusing to pass upon the said three propositions of fact, as they were not material to a determination of the issues in the case. In another proposition of fact submitted by the defendant, the court was asked to find as a matter of fact that the defendant did not conspire with her husband to cheat and defraud the plaintiffs, and this the court refused to hold. The following proposition of law was submitted to the court by the defendant and marked "held":

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"The court holds as a matter of law that before there can be any recovery by the plaintiffs in this case, the plaintiffs must prove by a preponderance of the evidence that the defendant falsely represented to the plaintiffs that the note of Rudolph W. Hamann was good; and that the plaintiffs, relying upon such representations of the defendant and believing such representations to be true, accepted said note in payment of the furniture in question; and the plaintiffs must further prove that at the time the defendant made such representations, said representations were in fact false and that the defendant knew such representations to be false."

This proposition correctly gave the law governing the case.

It is clear from a reading of all the propositions of law and fact held and refused by the court, that the court was of the opinion that the evidence proved that the act of the husband in inducing the plaintiffs to deliver to the defendant certain furniture and to accept in payment for the same the note of Hamann, was done in furtherance of a conspiracy between the defendant and her husband, as charged in the statement of claim. It is conceded that the defendant obtained the furniture in question after the plaintiffs parted with the possession of the same.

Finding no error in the record, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.





W. F. HANLON,  
Defendant in Error,  
vs.  
JOHN P. DUNNE,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 123

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a suit of the fourth class, commenced in the Municipal Court of Chicago, by W. F. Hanlon, defendant in error (hereinafter referred to as the plaintiff), against John P. Dunne, plaintiff in error (hereinafter referred to as the defendant), for \$120 commissions alleged to be due by reason of the sale of Dunne's property, 1006 North Franklin Street, Chicago, Illinois. The case was tried before a court and jury, and a verdict was rendered against the defendant for the amount of the claim. Judgment having been entered on the verdict, this writ of error followed. The suit is based on a letter signed by the defendant and addressed to the plaintiff, which reads as follows:

"Chicago, Illinois, Sept. 20, 1910.

Mr. W. F. Hanlon,  
1107 Schiller Building,  
Chicago, Illinois.

Dear Sir:

I hereby grant you for a period of Thirty Days from this date and thereafter until this agreement is revoked by me in writing the exclusive right to sell the property known as No. 1006 North Franklin Street, Chicago, Illinois, improved with a two-flat frame building with basement.

In consideration of your services in endeavoring to sell the said property I agree to pay you in case of a sale a commission of One Hundred Twenty Dollars of the price obtained if a purchaser is procured during said period, by you or me or any one else, upon any terms that I may accept.

The price of the property is Thirty-Five Hundred Dollars (\$3,500) and there is an existing encumbrance of \$1,300, which the purchaser is to assume and pay me the difference.

I agree to furnish a merchantable abstract of title to the said premises brought down to date of sale,



or a title guarantee policy for the amount of the above named purchase price, and within five days after the acceptance of said title I agree to deliver a good and sufficient warranty deed conveying said property to the purchaser.

(Signed) JOHN P. DUNNE."

*The facts show that*  
Immediately upon the receipt of this letter the plaintiff made efforts to sell the property. <sup>the</sup> In July, 1911, the defendant (the plaintiff taking no personal part in the immediate transaction), <sup>and that</sup> sold the property to <sup>certain persons</sup> Plotke & Grosby, partners in the real estate business, for the sum of \$2800. The defendant claims that the plaintiff, through an employe in his office, cancelled the contract the latter part of October or the first of November, 1910, and that he, the plaintiff, thereafter abandoned all efforts to sell the property. The plaintiff denied the alleged cancellation and abandonment, and asserted that it was through his efforts that the sale of the property was eventually made.

The defendant first contends that the option, or contract, in the letter of September 20, 1910, was, "in its inception unilateral and without consideration and void." It appears from the evidence that immediately upon the receipt of the letter by the plaintiff, he at once made efforts to sell the property. Conceding that the contract upon which the plaintiff relies was unilateral in its inception, it became a valid and binding contract when the plaintiff commenced his efforts to sell the property. Plumb v. Campbell, 129 Ill. 101, 103.

Defendant contends that the contract was cancelled by an employe of the plaintiff, the latter part of October or the first part of November, 1910. While there is no evidence in the record tending to show that the said employe had authority or power from the plaintiff to cancel the contract, it will be a sufficient answer to the present contention to say, that the testimony offered by the defendant in support of the alleged

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cancellation is controverted by evidence offered by the plaintiff on the same subject, and we cannot say that the finding of the jury on this question of fact is manifestly against the weight of the evidence.

The defendant contends that the plaintiff, as a matter of fact, abandoned the contract some time before the sale was made. This alleged abandonment was a controverted question of fact, and we cannot say that the finding of the jury on this question is manifestly against the weight of the evidence.

Defendant contends that the plaintiff was not the procuring cause of the sale. In the consideration of this contention, the following clause in the contract in question, must be borne in mind:

"In consideration of your services in endeavoring to sell the property, I agree to pay you in case of a sale a commission of one hundred twenty dollars of the price obtained if a purchaser is procured by you or me or any one else, upon any terms I may accept."

Under this clause, the plaintiff was entitled to the commission of \$120, whether he procured the purchaser or not, provided that he had not abandoned the contract before the said sale was made. Regardless of the effect of the clause in question, the jury might very well have found from the evidence that it was through the work of the plaintiff that the defendant made the sale in question.

Finding no error in this record, the judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

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WATSON FIREPROOF WINDOW CO.,  
Defendant in Error,

vs.

E. A. RYSDON, doing business as  
E. A. RYSDON & COMPANY,  
Plaintiff in Error.

) ERROR TO

) MUNICIPAL COURT

) OF CHICAGO.

189 I.A. 134

STATEMENT OF THE CASE. This was an action of the fourth class, brought in the Municipal court of Chicago by Watson Fireproof Window Company, (defendant in error (hereinafter called the plaintiff)), against E. A. Ryson, doing business as E. A. Ryson & Company, (plaintiff in error (hereinafter called the defendant)). The plaintiff (a New York corporation), being the owner of Letters Patent, No. 702754, from the United States Government, for an improvement in fireproof windows, entered into a written "license contract" with the defendant, dated September 1, 1910. The contract was signed at Chicago, Illinois, and was in substance as follows: Licensor grants to licensee shoprights to manufacture at his factory and elsewhere, windows embodying the invention of said letters patent and the right to sell the same throughout the United States and territories; licensee agrees to keep books of account of each window made and sold and that such books may be inspected by licensor; agrees to make bi-monthly reports and pay royalties; agrees to pay two cents per square foot of window area upon each window made and sold; acknowledges the validity of said letters patent; agrees that he will not make or sell any windows resembling said patented window nor place the same in unfair competition with the licensed window; agrees to pay as a minimum royalty \$500 per year, payable bi-monthly; the agreement contemplates the vigorous assertion of said patent against infringers, to the end that the licensee may be protected and the licensor agrees that it will institute all necessary suits and prosecute the same to

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conclusion, <sup>the</sup> that if an adverse decision is handed down by any Circuit Court of appeals licensee shall not be obliged ~~to~~ to pay royalty or guarantee until such decision is reversed by a higher court; if licensor does not take an appeal from an adverse decision licensee may refuse to pay royalties; licensor may terminate license on default of licensee; license to take effect 1st day of September, 1910.

The plaintiff obtained a license to do business as a foreign corporation from the State of Illinois, on September 22, 1910. During the period of two years between September 1, 1910, and September 1, 1912, the defendant paid to the plaintiff \$337.54 in royalties under said contract. On October 8, 1912, the plaintiff brought suit against the defendant in the Municipal Court of Chicago for \$262.46, the balance of minimum royalty alleged to be due to the plaintiff under the contract. The case was heard by the court without a jury, and the issues were found in favor of the plaintiff. Judgment having been entered on the finding for the amount of the plaintiff's claim, this writ of error followed.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

~~Defendant urged as ground for reversal:~~  
The defendant contends: (a) that the plaintiff, at the time the said contract was executed, was a foreign corporation, doing business in this State, without having complied with the statute of this State requiring foreign corporations to obtain a license before doing business in this State, and as a consequence thereof, said contract was void and no action can be maintained thereon; (b) that the plaintiff did not make out a case against the defendant, even if the contract were a valid one, since it failed to prove that the defendant was making the patent device in question; (c) that, even if the contract were a valid one, the plaintiff ought not to recover under said contract, for

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the reason that it breached the contract first, in that it did not protect the defendant against infringers, and permitted several firms to make its alleged patent device without interference or prosecution by suits against them; that when it did sue certain infringers, it failed to prosecute such suits to a conclusion.

The license contract between the plaintiff and the defendant was signed in Chicago, Illinois, September 1, 1910. On September 22, 1910, the plaintiff was granted a license by the State of Illinois authorizing it to do business as a foreign corporation within said State. There is evidence in the record tending to show that the plaintiff entered into contracts similar to the one in question in this case with other parties, but there is no evidence in the record that these were entered into prior to the date of the license granted by the State. The plaintiff would, of course, have the right to enter into contracts made after the latter date.

The doing of a single act of business does not constitute a violation of the "Foreign Corporation Act" of this State. Finch & Co. v. Zenith Furnace Co., 245 Ill. 588; Alpena Cement Co. v. Jenkins Reynolds Co., 244 Ill. 354; The Journal Company of Troy v. F. A. L. Motor Company, 181 Ill. App. 830; 19 Cyc. 1268. The defendant, in support of its contention that the plaintiff was doing business within the meaning of the act in question at the time of the making of the contract between the parties to this suit, relies upon the following cases: United Lead Co. v. Reedy Elevator Mfg. Co., 232 Ill. 199; Lehigh Portland Cement Co. v. McLean, 245 Ill. 323. In the first of these cases, suit was brought for merchandise sold and delivered by a foreign corporation unlicensed at the time of the transaction. It would appear from a reading of the case that the corporation did not contend that it was not doing business (within the meaning of the act) within the



State at the time of the transaction. It claimed that subsequent to the sale and delivery of the goods and prior to the commencement of the suit, it complied with the foreign corporation laws of this State, and its sole contention in the Supreme Court was that its right to bring the action was not barred by the statute; that it merely abated the suit, leaving to the corporation the right to maintain its action if it thereafter qualified itself to transact business in this State. The court ruled adversely to this contention. In the case of Lehigh Portland Cement Co. v. McLean, supra, the court held that the Act of 1905, regulating corporations doing business in Illinois, by its terms applies only to such corporations as are "amenable to the provisions of this act," and that it does not apply to foreign corporations, engaged in the business of interstate commerce.

We have reached the conclusion, after a careful consideration of the question, that the evidence does not prove that the plaintiff was doing business within the meaning of the foreign corporation act of May 18, 1905, at the time of the making of the contract of September 1, 1910.

In the view that we have taken of the present contention of the defendant, it will not be necessary for us to pass upon the question as to whether the business of making contracts similar to the one made by the plaintiff with the defendant would be doing business within the meaning of the Foreign Corporation Act.

We have considered the other contentions made by the defendant, and we find them without merit. The judgment of the Municipal Court of Chicago will therefore be affirmed.

AFFIRMED.

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VS.

L. FISH FURNITURE COMPANY, a corpor-  
ation,  
Appellant.

CIRCUIT COURT

COOK COUNTY.

139 I.A. 136

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by John F. Devine, Administrator of the Estate of Sanford T. Sinclair, appellee (hereinafter referred to as the plaintiff), against L. Fish Furniture Company, appellant (hereinafter referred to as the defendant), and Katharine McCormick, Kleanor Patterson, Joseph Medill Patterson and Robert Rutherford McCormick, trustees, to recover damages for the death of the said Sinclair, alleged to have been caused by the negligence of the defendant and the said trustees, defendants in the court below. The jury returned a verdict finding the L. Fish Furniture Company guilty and the said trustees not guilty, and a judgment for \$2500, the amount of the verdict, having been entered, this appeal was prosecuted by the L. Fish Furniture Company. The plaintiff's intestate was employed in the office on the sixth floor of the defendant's mercantile establishment, and was killed by a fire that occurred in the said premises on March 25, 1910. Fourteen persons were working on the 6th floor at the time the fire broke out; of these eleven, all of whom were employed in the office located on that floor, were killed. It appears that a number of suits were started against the defendant, as a result of the fire. The case of Hunt, Administrator v. L. Fish Furniture Company, No. 19384, recently decided by this court, is one of these. In that case, the statement appended to the opinion contains a statement





of facts that will serve the same office for this opinion (as far as the evidence is concerned), as it is agreed between the counsel in this case that the evidence in that case is substantially the same as that in the case at bar. As the declarations in the two cases are not the same, that part of the said statement that refers to the declaration may be disregarded.

The defendant contends that "the court erred in refusing to instruct the jury that the defendant was not liable, unless it had been notified by the Chief State Factory Inspector, or his Deputy, that the means of egress were insufficient and unreasonable, and had specified the necessary changes." This contention is completely and adversely answered by the following cases: Amea v. Ayres, 192 Ill. 601; Landgraf v. Ruh, 188 Ill. 404; Cowen v. Story & Clark Piano Co., 170 Ill. App. 92 (certiorari denied by the Supreme Court); Carrigan v. Stilwell, 97 Maine 247, 252; Hayes v. M. C. R.R. Co., 111 U.S. 323, 240; Streeter v. Western Scraper Co., 254 Ill. 244, 247.

The defendant contends that the court erred in giving to the jury the first instruction of the plaintiff. We deem it advisable to quote the specific objections by the defendant to the instruction: "In the first instruction given on behalf of the plaintiff, the court told the jury that the statute made it the duty of the defendant to provide the building in question 'with sufficient and reasonable means of escape in case of fire.' It did not limit the means of escape to means of egress, as the statute plainly does, nor did it tell the jury that the statute required merely, more than one reasonably sufficient means of egress in case of fire. It did not even set forth the language of the statute nor state its substance correctly. \* \* \* The instruction as given does not limit the jury to a determination of whether any of the charges of negligence made in the declaration



were true, viz: that there was only one means of egress and that that one was sufficient means of escape, or was blocked or out of repair or not marked, but it allows the plaintiff to recover if there was several means of egress irrespective of whether these were open, marked and in repair, and each a reasonably sufficient means of escape. For, as the words 'more than one means of egress' are omitted, the jury might say that ten should have been provided, whereas the allegation is that only one was provided and that was insufficient." The plaintiff's case, in each of the two counts, upon which the case went to the jury, was predicated upon an alleged violation by the defendants of section 14 of the "Act to provide for the health, safety and comfort of employees in factories, etc.," approved June 14, 1909, Hurd's Rev. Statutes 1912, chap. 46, p. 1151. This section reads as follows:

"In all factories, mercantile establishments, mills or workshops, sufficient and reasonable means of escape in case of fire shall be provided, by more than one means of egress, and such means of escape shall at all times be kept free from any obstruction and shall be kept in good repair and ready for use, and shall be plainly marked as such."

We are unable to agree with the counsel for the defendant in their interpretation of the statute in question. We are satisfied the trial court correctly interpreted the same. Plainly, the statute means that in all cases ~~the~~ factories, etc., must be provided with more than one means of egress, but in each particular case, the place must be provided with sufficient and reasonable means of escape in case of fire. Whether a compliance with the statute in a given case requires that more than two means of escape, in case of fire, be provided, depends upon the facts of the particular case. The defendant complains that the trial court omitted from the instruction an essential part of the statute, viz: "by more than one means of egress." A court, in instructing

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a jury as to a statute, is not compelled to quote the statute verbatim, but may give to the jury the legal effect of the same. In fact, if there is anything in the language of the statute, calculated to mislead the jury as to the law, the latter method is to be preferred. The statute in question, by reason of the language last quoted, was calculated to mislead the jury, and it was highly proper for the trial court to give to the jury (instead of the exact language of the statute) the legal effect of the same.

The defendant complains that the second and third instructions given by the court at the instance of the plaintiff were erroneous. In the second instruction the court instructed the jury that the duty of the defendant under the statute "was not fulfilled by providing any number of means of egress, if you believe from the evidence that the means of escape provided were not sufficient and reasonable means of escape in case of fire." This is a correct statement of the law. In the third instruction the court quoted the statute verbatim, and ended with the following, "and by reason of such statute, it then and there became the duty of said defendants and all of them to provide such building with reasonable and sufficient means of escape in case of fire." The defendant contends that the court should have added to the language quoted the statutory words: "by more than one means of egress." What we have heretofore said in reference to a similar complaint, made as to the first instruction, disposes of this contention.

The defendant complains of the action of the court in refusing the 17th instruction asked by it. No authorities are quoted by the defendant in support of this instruction. Instructions of this character were condemned in the case of West Chicago Street Ry. Co. v. Petters, 193 Ill. 228, 300, as calculated to



confuse and mislead the jury. It was not contended by the plaintiff that the defendant was an insurer of the safety of the deceased employes, and the jury might very well draw an erroneous conclusion from the giving of such an instruction.

Defendant complains of the action of the court in refusing to give instruction No. 22, offered by the defendant. This instruction reads as follows: "The court instructs you as a matter of law that if you find from the evidence that the defendant L. Fish Furniture Company had at the time of the fire in question provided the building in question with sufficient and reasonable means of escape in case of fire by more than one means of egress, and that such means of escape were at the time of the fire plainly marked and free from any obstruction interfering with access thereto, then said defendant cannot be held liable because the fire originated in the part of the building where such means of escape were located and thus cut off access to such means of escape, but in that event you must find the defendant L. Fish Furniture Company not guilty." This instruction was misleading and argumentative, and it assumes that the means of escape were cut off to the employes by the fire and not by the alleged obstructions. It (an instruction directing a verdict) also called upon the court to interpret the statute in question as meaning that sufficient and reasonable means of escape in case of fire were complied with in the present case if "more than one means of egress," were provided for, if "such means of escape were at the time of the fire plainly marked and free from any obstruction, interfering with access thereto." As we have heretofore held, this is not the law.

The defendant's contention that the court erred in refusing instruction No. 35, requested by the defendant, is without merit. The instruction is bad for several obvious reasons.





The defendant contends that the court committed prejudicial error in refusing to strike out certain testimony of the witness Corcoran, and in refusing to instruct the jury to disregard the same. We do not deem it necessary to decide whether the evidence complained of was competent or incompetent, as we are unable to see how its admission could have possible prejudiced the defendant in this case. The statute required the defendant to provide the building in question with sufficient and reasonable means of escape in case of fire, and to keep such means of escape free from any obstruction at all times. The proof, independently of the testimony complained of, shows clearly that the defendant did not comply with these requirements, and that the plaintiff's intestate lost his life by reason thereof. This being so, and there being no complaint that the verdict is excessive, what material difference does it make whether the said testimony of Corcoran was competent or incompetent?

The defendant contends that the court should have instructed the jury to find the defendant not guilty; also that the verdict of the jury is against the greater weight of the evidence. We find no merit in either of these contentions. The plaintiff clearly made out a prima facie case under the declaration, and we cannot say that the verdict is manifestly against the greater weight of the evidence.

The defendant contends that there was a fatal variance between the proof and the declaration, and that the court should have stricken <sup>on</sup> out certain evidence offered by the plaintiff because of the said variance. We find no merit in this contention.

We have carefully and patiently considered all of the various errors assigned by the defendant, and we find that none of them is meritorious. The verdict of the jury in finding the defendant guilty is clearly warranted by the evidence in the case;



the able and experienced trial judge has approved the verdict, and we are satisfied from an examination of the record that the defendant has had a fair trial and that justice has been done.

The judgment of the Circuit Court of Cook County will be affirmed.

AFFIRMED.



ALICE G. ROHERTY, administratrix  
de bonis non of the estate of  
Hugh D. Roherty, Deceased,  
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,  
Defendant in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

189 I.A. 139

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The plaintiff in error (hereinafter called the plaintiff), as administratrix de bonis non of the estate of Hugh D. Roherty, deceased, brought an action on the case against the defendant in error, the Chicago Railways Company, (hereinafter called the defendant) for causing wrongfully the death of the plaintiff's intestate. The case was tried before the court and a jury, and a verdict was returned in favor of the defendant; a motion for a new trial was overruled and judgment was entered on the verdict, and this writ of error followed. The plaintiff claimed on the trial that the defendant on April 18, 1911, through its servants, negligently ran one of its West Randolph street cars, in the city of Chicago, into and against a wagon in which the said deceased was riding in Ann street and across said West Randolph street, in the city of Chicago; that the car struck the wagon with great force and violence, throwing the deceased (who was in the exercise of ordinary care, etc.) to the ground and causing injuries from which he died on April 28, 1911. The defendant, on the trial claimed that the servants of the defendant were not negligent at the time of the accident, and that the accident was the result of negligence on the part of the deceased, and that the deceased did not die as a result of the injuries he sustained at the time of the accident, and that his death was caused by lobar pneumonia.

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We find from a reading of the evidence that the case is a close one on the facts; it is therefore necessary that the record be free from substantial error.

The plaintiff contends that the counsel for the defendant made highly improper and prejudicial remarks to the jury in his closing argument. On the cross-examination of Albert F. Simerott, a Chicago policeman and a witness for the defendant, counsel for the plaintiff brought out the fact that he had seen and talked with the witness in the corridor of the court room on the morning of the day that the witness testified, and that the witness, after he was informed that the counsel represented the plaintiff, refused to tell him what he knew about the facts of the case. After the attorney for the plaintiff had made his opening argument to the jury, Mr. Rosenthal, counsel for the defendant, made an argument to the jury in behalf of the defendant. During the argument, the following occurred:

"Mr. Rosenthal (addressing the jury) 'He says Simerott too wouldn't talk to him. I want to pass it up to you gentlemen, with all the responsibility that I labor under in this case, and some of the things that I have told you about, should I expect the man, who, under the ethics of his profession should assist the court, assist the jury, who has raised his hand to his God to support the Constitution of the United States to the best of his ability, when my witnesses are testifying upon the stand, to sneak out into the hall and try to get a police officer to change his testimony--

Mr. Mason: I object.

Mr. Rosenthal: Mr. Mason, I owe you one.

Mr. Mason: I object to that statement, if the court please, as not supported by anything in the record or by any inference to be drawn from it.

Mr. Rosenthal: Just let me show you the inference.

Mr. Mason: I object to the statement.

Mr. Rosenthal: Let the court state the inference.

The Court: The court is obliged to sustain the objection and ask you to desist from further discussion along the line that you have started. If you want to remark upon just what happened as disclosed from the evidence there you may do so.

Mr. Rosenthal: I note an exception. Then I will do this, I will pass it up to you gentlemen whether my argument is correct or not. That man went out into the hall --

The Court: Just a minute, Mr. Rosenthal, you will pass nothing of that kind up to the jury.

Mr. Rosenthal: Let me if your Honor please.





The Court: You will not pass up to the jury the question as to whether your argument is proper or not when the court has intimated by its ruling that it is not proper.

Mr. Rosenthal: May I ask the court this question: Can't I comment on what transpired in the hall?

The Court: You can, but you can't say to this jury that you will pass up the question of whether your argument is proper after I have ruled on it.

Mr. Rosenthal: Yes, yes, I am wrong in it; if I said that in the heat of this argument, forget it. Now then, I will discuss what took place, as I claim the evidence showed. While my testimony was going on in here, police officer Simsrott stood out in the hall. This gentleman, Mr. Mason, himself interrogated this officer as to whether he didn't approach him outside in the hall and ask him to discuss the case with him. His case was closed, wasn't it? What difference did it make to him then what officer Simsrott would have to say upon the stand, unless it was for one purpose, that he wanted to talk to officer Simsrott for the purpose of getting him to change what he was going to say upon the witness stand. I pass that up to you, gentlemen as judges of the facts in this case under the instructions of the Court, as to whether honestly and legitimately that wasn't his purpose."

There was not a scintilla of evidence in the case to sustain the grave charge made against the counsel for the plaintiff by the counsel for the defendant; there was nothing improper or unethical in the conduct of the counsel for the plaintiff in approaching the police officer in the hall of the court room and asking him to tell counsel what he knew about the facts of the case. In fact, his conduct was entirely within the line of his duty to his client. It will be noticed that the counsel for the defendant, after the court had sustained the objection of the counsel for the plaintiff, persisted in arguing to the jury that the purpose of the counsel for the plaintiff in talking to the witness was to induce the witness to change the testimony that he was to give upon the witness stand. The remarks of the counsel were highly improper and were of a character likely to prejudice the plaintiff, notwithstanding the ruling of the court, and we cannot say, after an examination of the entire record in this case, that the verdict is so clearly right that a new trial ought not to be granted notwithstanding the prejudicial argument. As the case is a close one on the facts, we think, in view of the recent decision of the Supreme Court in the

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case of Appell v. Chicago City Railway Co., 239 Ill. 561, that the conduct of counsel for the defendant in his closing argument, when the entire record in this case is considered, constituted prejudicial and reversible error.

The plaintiff complains that the court made improper and prejudicial remarks<sup>to</sup> the counsel for the plaintiff in the presence and hearing of the jury, during the cross-examination of Dr. John Leeming, a medical expert called on behalf of the defendant. This witness testified upon direct examination that the injury suffered by Roherty, the deceased, from the accident in question had no causal relation to his death, and the witness gave an opinion, based upon a hypothetical question, that Roherty died of lobar pneumonia. His testimony was of a very important character, and the plaintiff's attorney had the right to fully and fairly cross-examine him in relation to the matters about which he had testified on his direct. At the very outset of the cross-examination, the following occurred:

"Q. (By Mr. Mason, counsel for plaintiff): What are the early symptoms of pneumonia, doctor?

The Court: He has been all over that.

Mr. Mason: Your Honor, I am cross-examining the witness.

The Court: Yes, but cross-examination does not necessarily mean you have got to elicit exactly the same answer.

Mr. Mason: No, but I think, if the court please, I have a right to cross-examine upon anything that he has testified to in chief.

The Court: There is not any question about that. The only question is whether you are going to take up time going over the exact same thing.

Mr. Mason: I do not think I am, and I object to the question of the court directed to me in that manner, and take an exception to it.

The Court: I did not understand that.

Mr. Mason: I say I take an exception to the remark of the court in the presence of the jury.

The Court: I will get it from the record. Just read the remark of counsel. (Objection read.)

The Court: At this time, Mr. Mason, I shall do nothing except let the record show that the exception is granted. At the conclusion of this trial I shall expect you to wait until I have an opportunity to discuss further with you the matters of your objection. Proceed with the examination.



Mr. Mason: I take an exception, most respectfully, to the remark of the court directing me to wait after the trial of this cause.

The Court: Proceed now."

The plaintiff contends that the remarks of the trial judge were unwarranted, unfair and extremely prejudicial; that the court, without any just reason, conveyed to the jury the impression that the counsel for the plaintiff was wasting time in the manner of his cross-examination, that he was guilty of contempt of court; and further, that the language of the court conveyed a threat to punish the attorney for contempt at the conclusion of the trial. After a careful consideration of the present contention of the plaintiff, we are forced to the conclusion that there is merit in it, and we are unable to say that the conduct of the court was not prejudicial to the plaintiff. The question propounded by the counsel to the witness on cross-examination was a proper one, and we find nothing disrespectful in the language of the counsel to the court, nothing that would warrant the veiled threat of the court. The jury might very well have understood from the language of the court that he considered that the counsel for the plaintiff was not only wasting time, but that he was disrespectful in his conduct towards the court, and that the court was intimating to the counsel that he would punish him for contempt at the conclusion of the trial. It is very doubtful if the jury, after this action of the court, gave to the counsel for the plaintiff, in his subsequent examinations of the witnesses and in his arguments to the jury, that attention and consideration which was necessary to a fair trial of the lawsuit. The conduct of the court certainly tended to unduly and unfairly disparage the attorney for the plaintiff in the eyes of the jury, and we are unable to say that it was not prejudicial to the rights of his client.

The plaintiff contends that the court erred in permitting the defendant's counsel, on the cross-examination of the plaintiff's

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witness, Fred Henze, to ask said witness irrelevant and immaterial questions, which tended to humiliate and degrade the witness and to prejudice the jury against him. We find this contention of the plaintiff to be well founded. The witness, Henze, was an important one for the plaintiff, and the attorney for the defendant on cross-examination of the said witness was allowed, over the objection of the plaintiff, to ask a number of questions, the clear purpose of which was to show that the witness (a married man) was living with a certain woman in a state of adultery. Such questions were undoubtedly improper, as they did not tend to show whether or not the witness was telling the truth on the stand, and the virtue or lack of virtue of the witness was not an issue in the case. Waters v. West Chicago Street R.R. Co., 101 Ill. App. 265; People v. Brown, 254 Ill. 260.

It is true that the court stated that he was not allowing the questions for the purpose of inquiring into the morals of the witness, but only for the purpose of inquiring into the question as to whether the witness had on certain occasions called himself by a different name than the one given by him on the witness stand, conceding that the defendant would have the right, on cross-examination, to examine the witness on the subject of the alleged alias, nevertheless we are satisfied that a number of the questions put to the witness and allowed by the court over the objection of the plaintiff were plainly designed for the sole purpose of attempting to show that the witness was not living with his wife and was living in a state of adultery with another woman.

Plaintiff makes a number of other points, all of which we have examined, and several of which we find to be meritorious. We do not deem it necessary, however, to specifically refer to these. For the errors indicated in this opinion, the judgment of the Circuit court of Cook county will be reversed and the cause remanded.

REVERSED AND REMANDED.





THE PEOPLE OF THE STATE OF ILLI-  
NOIS, ex rel. WINIFRED E. WHITE,

Defendant in Error,

vs.

MARION H. CULVER and MORTON T.  
CULVER,

Plaintiffs in Error.

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ERROR TO

SUPERIOR COURT

COOK COUNTY.

189 I.A. 141

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a petition for a writ of habeas corpus, filed in the Superior Court of Cook County March 17, 1918, by Winifred E. White, defendant in error, (hereinafter called the relatrix) in the name of the People of the State of Illinois, against Marion H. Culver and Morton T. Culver, plaintiffs in error, (hereinafter called the respondents) to obtain the possession and custody of Dorothy Vera White, a young child, the daughter of the relatrix. The petition alleges that the child was of the age of five and one-half years, and that she was restrained of her liberty by the respondents; that the said Marion H. Culver was the sister of the relatrix and that the said Morton T. Culver was the husband of the said sister; that the relatrix was a widow, her husband, the father of the said child, having died on or about November 11, 1911; that on October 13, 1907, the relatrix, being at the time without means of support, upon the request and invitation of said Marion H. Culver, went to live with the said respondents in their home in Glencoe, Cook County, Illinois, taking with her the said child; that from November, 1907, until November, 1908, the relatrix and the said child lived with the said respondents; the relatrix doing all of the housework, in consideration of which she was furnished by the respondents with board and lodging for herself and said child; that on or about November 15, 1908, Marion H. Culver ordered the relatrix to leave the said premises and to take with her two other children of the relatrix, who were



also then living at the residence of the Culvers; that thereupon the relatrix did leave the said premises and shortly thereafter she took therefrom the said other two children, leaving the child, Dorothy, in the care of the respondents until such time as said relatrix should be able to take care of Dorothy; that the relatrix is now and has been for some time past in a position to take care of Dorothy and bring her up in a proper manner; that the relatrix has made repeated demands of the respondents to deliver up to her Dorothy, but that the respondents refuse so to do. The answer of the respondents alleges in substance that in the month of November, 1908, the relatrix abandoned the child Dorothy to the respondents, and that the relatrix is an unfit person to have the control, care and custody of the child. A traverse was filed to the answer, and the case came on for hearing before the trial court on April 18, 1913. The court found the issues in favor of the relatrix and ordered the respondents to deliver the child to her, in open court. Judgment was entered on the findings and this writ of error followed, and the case has been made a supersedeas by this court.

The respondents contend that the trial court erred in holding that the relatrix was legally entitled to the custody of the child; that the evidence in the case clearly shows that the relatrix is an immoral woman and an unfit person to have the care, custody and control of the child; that the relatrix abandoned the child to the respondents in November, 1908, and that the respondents are fit and proper persons to have the custody and control of the child.

The right of the parent to the custody of the child is superior to the right of any other person, if he or she is a fit person to have such custody, and the law presumes, in the absence of proof to the contrary, that the parent is a fit person, and it requires clear proof to the contrary before it takes away from him



or her this right of custody. This right in the parent, however, is not an absolute one, that is accorded to them under any and all circumstances, and it may be taken away for good and sufficient cause by the paramount right of the State to insist that the safety, morals, health or happiness of the child be not endangered. The controlling question, in a case of this kind, is, what is for the best interests of the child? "In contests between parents and third persons as to the custody of a child of such parents, the opinion is now almost universal that neither of the parties has any rights that can be allowed to seriously militate against the welfare of the infant." Church on Habeas Corpus, 2nd Ed., 696. The court is not obliged to award the custody of the child to either of the contending parties to a suit, but may award it to a third party if the welfare and best interests of the child demand it. Hurd on Habeas Corpus, 2nd Ed., 461-473.

A habeas corpus case, that involves the custody of a child, is in its nature an equitable proceeding, and it is the settled law of this State that a court of review will not disturb the findings of fact of the trial court in such a case, unless it is apparent that clear and palpable error has been committed. After a careful and painstaking consideration of all the evidence, in the light of the rule just stated, we find ourselves forced to the conclusion that the trial court erred in finding that the relatrix was a fit and proper person to have the care, custody and control of the child in question. Viewing the testimony as to the fitness of the relatrix in the most charitable light, it shows clearly, to our minds, that she does not possess the moral character that is absolutely essential in the person to whom a court would entrust the care and custody of a young girl. As no useful purpose would be served in reciting the many facts and circumstances that have forced us to this conclusion, the nature of



the evidence itself fully justifies us in avoiding a recital of the same. We therefore hold that the court erred in finding that the relatrix was legally entitled to the custody of the child.

Much has been said in the briefs of counsel as to the fitness of the respondents to retain the care and custody of the child. In the view that the trial judge took of the case it was not necessary for him to pass upon this question, and he did not do so. The question is not now before us for our consideration, and it would be improper for us to intimate any opinion on the subject. What is for the best interests of the child, under present conditions, the trial court must determine from the evidence that may be submitted to him.

For the error indicated, this case will be reversed and remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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CITY OF CHICAGO,

Defendant in Error,

vs.

LOGAN SQUARE MOTOR CLUB,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 142

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a proceeding brought by the City of Chicago against the Logan Square Motor Club for operating and maintaining a garage without a license in violation of Section 2684 of the Municipal Code of Chicago of 1911. Sections 2683, 2684 and 2695 of said code, are as follows:

"Section 2683. The word 'garage' as used in this article shall be held to mean, and is hereby defined as meaning, any barn, stable, building or other place in the city where automobiles, auto cars or any similar self-propelled vehicles are kept or let for hire or reward to any person whether such vehicle be hired out or let with or without any operator for same, or where such vehicles are kept ready for use and where rent is paid to the keeper thereof for such keep."

"Section 2684-Garages to be licensed-frontage consents. No person, firm or corporation shall keep, conduct or operate a garage in this city without first obtaining a license so to do in the manner hereinafter provided, and it shall not be lawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet of any building used as and for a hospital, church or public or parochial school or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any garage in the city in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within 100 feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street.

Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction of any such building; provided, that in determining whether two-thirds of the buildings on both sides of such street are used exclusively for residence purposes, any building frontage upon another street and located upon a corner lot shall not be considered; and provided, further, that the word 'block' as used in this section, should not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets, one on either side of the lot on which said garage is to be located, built, constructed or maintained."

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"Section 2693. Any person violating any of the provisions of this article, where the penalty is not otherwise herein provided for, shall be fined not less than five dollars nor more than one hundred dollars for each offense, and his license shall be subject to revocation by the mayor."

The case was tried by the court without a jury; the defendant in error was found guilty of a violation of the ordinance, and a fine of \$50 was assessed. Judgment <sup>of \$50</sup> ~~was~~ entered on the finding and this writ of error followed.

The facts in the case (elicited by the defendant in error from officials of the plaintiff in error corporation) are substantially as follows: The plaintiff in error corporation was incorporated on May 17, 1912, as a corporation not for profit. The alleged purposes of the corporation were, "to organize and maintain a social club for the encouragement of motoring and for the mutual benefit thereof, to own, run and maintain a clubhouse and garage to be enjoyed by the members of the club." The officers of the corporation were: Fred Gloor, president; F. E. Thornton, vice-president; H. J. Muir, secretary. A few months prior to the incorporation of the defendant corporation, the Logan Square Motor Car Company, a corporation for profit, was incorporated with the same officers. Both of the corporations were located at 2533-35 North Sacramento avenue, Chicago. These premises are owned by Mrs. F. E. Thornton, the wife of said F. E. Thornton. The place in question is a one-story building of the style usually used for public garages; the building covers the two lots and has a large entrance in the front part of it. The Logan Square Motor Club occupies the front part of the building, except a space about 12 by 16 feet, that the club allowed the Logan Square Motor Car Company to use in its business. This 12 by 16 feet space is not partitioned off from the part used by the club. The rear part of the building is occupied by the Motor Car Company as repair rooms for cars. A small place in the front part of the floor is partitioned off as an

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office, and is furnished with a desk, chairs, magazines, motor papers, and a telephone. The plaintiff in error has no clubhouse or club quarters except the premises in question. In order to become a member of the club, a person signed a small application card agreeing to pay to the club \$15 per month as dues. He then had the right to immediately put his car, whether it was a pleasure car or business truck, into the club garage, provided he paid \$5 on account of the dues for the first month and agreed to keep the car in the club garage at least a month. From the date of the organization of the corporation until the trial of this case in the lower court, no applicant for membership had been rejected and no investigation had been made of any applicant. To quote from the testimony of the witness Harold Muir: "When a man comes into the garage and says he wants to become a member of the club for a month he signs the application and we take his car. We make no investigation as to him in any way." The club <sup>held</sup> meetings once a month, at which a few persons, all of whom appeared to have been connected with the Logan Square Motor Company, attended. The business and finances of the plaintiff in error were handled by the secretary of the club, Harold Muir, who was also secretary and manager of the Logan Square Motor Car Company. The only social affair of any kind that was given by the club was a "motor run." This was participated in by four persons, all of whom were interested in the Logan Square Motor Car Company. From the time of the organization of the club until the trial of the case in the lower court, the only privilege enjoyed by a member was the right to keep his car in the club garage and to have employees of the club was <sup>h</sup> the car and keep it ready for use. It is admitted that the plaintiff in error did not take out a garage license.

Plaintiff in error contends that it is not a business organization conducting an establishment sought to be reached by the ordinance, but that it is a social organization of citizens for



the promotion of the enjoyment of its members in social ways, and that as a private social organization, its members have the right to keep their autos in the club quarters, and that under the provisions of the ordinances in question, a license is only required for a public garage in the nature of a public livery stable.

The defendant in error contends: (1) that the Logan Square Motor Club was organized and maintained as a subterfuge, shift, or device to permit the operation of a garage without a license; (2) "the Motor Club, even if it is conceded to be a bona fide club, is subject to the requirement of procuring a license to maintain its club garage. The operation of a club garage is one of the principal purposes of this club as expressed in its charter, and this garage furnished the facilities and service of any ordinary garage, except that it limited its services to a certain class of persons. The club is a corporate entity separate and distinct from its members who own the cars, and when the club undertakes to store, clean and keep ready for use the cars of its members for which they pay certain monthly dues or fees, the club is conducting a garage within the meaning of section 2383 of the Municipal Code of Chicago which defines a garage as a place, 'i. e. - Where such vehicles (automobiles) are kept ready for use, and where rent is paid to the keeper thereof for such keeping'."

After a careful consideration of the facts in the case, we are satisfied that the trial court was justified in holding that the Logan Square Motor Club was a garage within the meaning of the ordinance in question. The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

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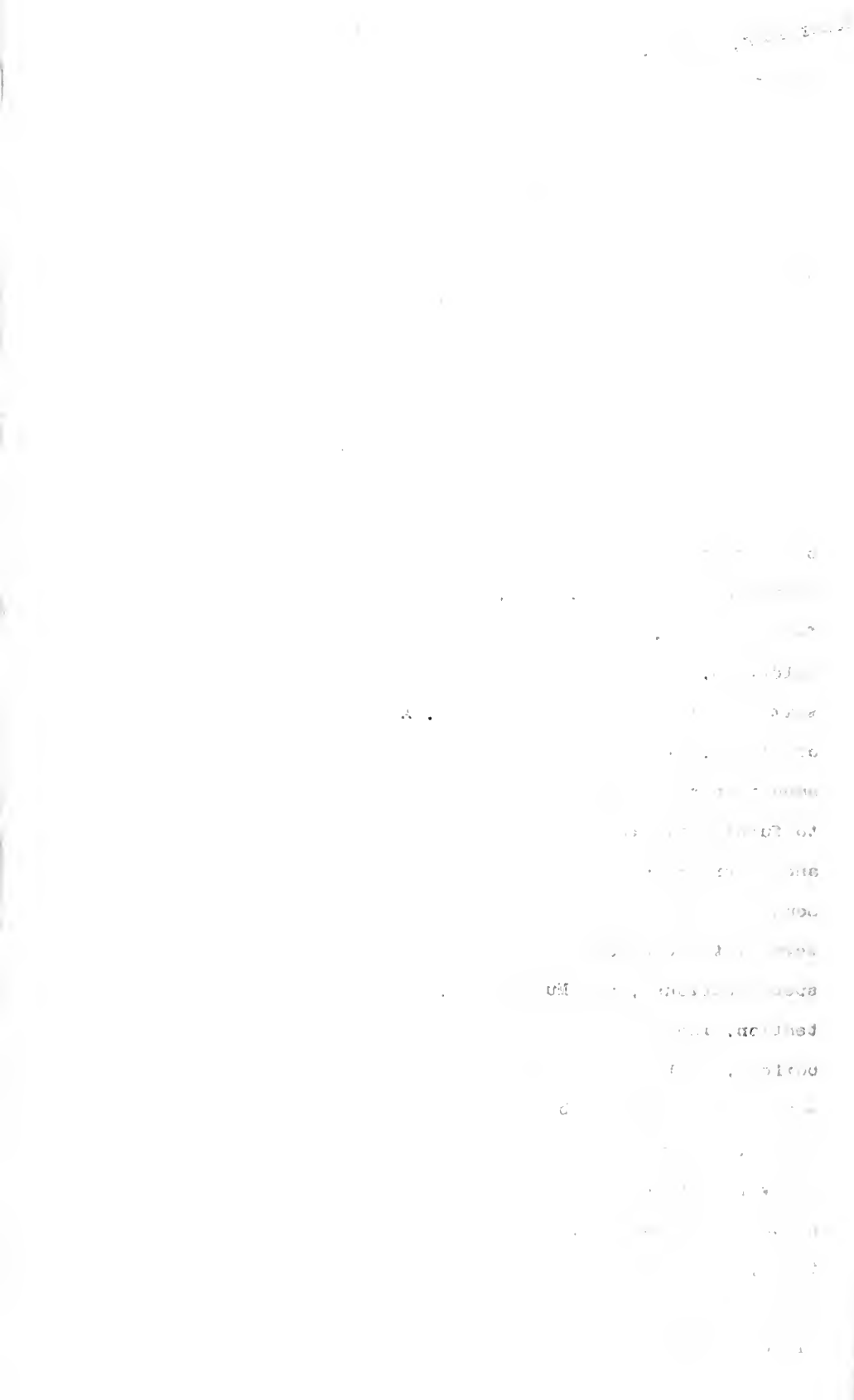
MORRIS GOLDSTEIN,  
Defendant in Error,  
vs.  
ISRAEL MULLER,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

1891.A. 145

MR. PRESIDING JUSTICE BROWN  
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment for \$100 rendered by that Court on December 22, 1911, against Israel Muller, the defendant below, plaintiff in error here, in favor of Morris Goldstein, plaintiff below and defendant in error here. The suit was brought to recover \$259. According to the "Statement of Claim", \$100 of this was a claim for overpayment of that amount on a contract by which Muller for \$900 had undertaken to furnish all labor and materials for plumbing, gas fitting and sewerage on a building Goldstein was erecting at 1251 South Spaulding Avenue in Chicago. The labor and materials were by the contract to be in accordance with certain plans and specifications, and Muller had, according to Goldstein's contention, installed six plain boilers instead of six beerless boilers, failed to make certain gas connections and installed a two part laundry tub instead of a three part one. These things, according to Goldstein's contention, reduced the cost and value of the work and materials by \$100, making the amount he ought to pay \$750. As he had paid Muller \$850 on the contract, he asked for the return of \$100. One hundred dollars more of the \$259 was an amount Goldstein claimed was due to him on a contract by which Goldstein had undertaken to do the



carpenter work on a building of Muller's which Muller was erecting at 1253 South Spaulding avenue. The contract was for \$3400 and Goldstein claimed he had been paid but \$3300. Thirty-four dollars of the remaining \$59 claimed was for work performed by Goldstein for Muller in remodeling a dining room at premises at 13th and Albany streets, and \$25 for the value of two frames and sash furnished at 1251 South Spaulding avenue.

Muller contended, on the other hand, that he performed "all the work which he was supposed to perform" under his agreement (which he says was oral and not written) with Goldstein; that he had paid the full amount of the \$3400 and for the work done in repairing a dining room, and that the frames and sash were included in the \$3400 contract.

He further filed a counter claim in which he said that Goldstein was indebted to him in the sum of \$104 for cash loaned, in a further sum of \$83.55 for repairing and connecting water pipes at 1251 South Spaulding avenue, and in a further sum, which he probably meant to be \$300, but which figures according to his counter claim as \$299.45,

"For damages sustained by the defendant, I. Muller, on account of the failure of the plaintiff, Morris Goldstein, to do and perform all work according to the contract entered into between the plaintiff and defendant for the doing of all the carpenter work at the premises situated at 1253 South Spaulding avenue."

The plaintiff denied any such indebtedness to the defendant.

The cause was tried before the Court without a jury.

The so-called "Statement of Facts" before us is a nondescript affair, partly like a common law bill of exceptions and partly what appears to be a stenographic report, but completely neither, and certainly, despite the certificate



of the Judge to that effect, not "a correct, true and accurate statement of all the facts appearing upon the trial of said cause and of the questions of law involved in said cause and the decision of the Court upon said questions of law."

From the best consideration, however, we can give to the document, we see no error in law which should reverse the judgment nor any such preponderance of evidence on the part of the defendant as should prevent the plaintiff recovering the amount which he did recover. Even if the admission of the contract for the plumbing signed by Goldstein, but not by Muller, "for the purpose", as the Court said, "of corroborating the testimony of the witness, Mr. Goldstein, with reference to what transpired and what was said in making the verbal agreement for the sidewalk" was erroneous, which, considering that Goldstein testified that Muller kept the contract and never returned it, but proceeded to do the work under it, we by no means decide; yet as the cause was tried by the Court without a jury, that would not constitute a sufficient cause of reversal. The Court will be presumed to have formed his conclusion upon the competent evidence only.

As to the preponderance of proof, there is no hard and fast rule which forbids a trial court, before which the witnesses appear and which weighs the testimony, from believing one witness rather than two others that contradict him. It all depends on the circumstances, the witnesses and the nature of the testimony.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

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189 I.A. 171

THE STANDARD BREWERY,  
a corporation,  
Defendant in Error,

vs.

HENRY FINKELSTEIN,  
Plaintiff in Error.

REPORT TO THE MUNICIPAL  
COURT OF CHICAGO.

J. H. PRESIDING JUSTICE BROWN  
DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse a judgment of the Municipal Court of Chicago for \$373.14 in favor of the Standard Brewery, plaintiff below and defendant in error here, against Henry Finkelstein, defendant below and plaintiff in error here. The judgment was rendered on an instructed verdict. The plaintiff in error in his brief very correctly says - citing cases to sustain his statements - that where there is evidence tending to sustain the defense the court ought not to take the case from the jury, and that the court is only authorized to give a peremptory instruction for the plaintiff when the plaintiff is entitled to a verdict upon the evidence and there is no evidence to warrant a verdict for the defendant.

But to apply these undeniable propositions to the present case is to beg the question. The facts appeared with great clearness in the evidence, however confused the defendant may seem to have been in his testimony.

By two writings, to be taken together, executed on or about August 15, 191 , Finkelstein agreed to buy beer from the Standard Brewery from November 1, 1910, until April





30, 1914, at a price of \$4.50 a barrel, and plaintiff, in consideration of defendant using the beer during said period, agreed to loan the defendant certain fixtures and to make certain improvements in the premises, the cost of which, as per bill of the contractor who installed them, would be returned to the plaintiff by defendant "in case of a breach of contract on his side during term of contract." The amount of beer to be taken was provided for between certain limits. It was to be no less than three barrels nor more than thirty during each week of the period of time from November 1, 1910, to April 30, 1914.

The improvements were made and were paid for by the plaintiff according to the contractor's bill. The amount paid was \$373.14. About March 25, 1912, the defendant closed his saloon business and declined to take and did not take any more beer. He thus became liable to the plaintiff for the \$373.14, represented by the judgment which he is now seeking to reverse.

His defense is that the plaintiff first broke the contract, not he; that the plaintiff charged him \$5.00 a barrel for beer in November, December and January, 1912. It plainly appears that according to the practice of Chicago breweries at the time all the beer was charged at six dollars a barrel and then a rebate made to bring the price to the contract price that the brewery might have with the customer; that the proper rebate to the defendant herein was therefore \$1.50 a barrel. By oversight in the three months mentioned book entries were made which only gave the defendant a rebate of \$1.00 a barrel on the fifty barrels delivered during those three months. But during all that time the defendant was indebted to the plaintiff in a sum much greater

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2. The second part of the report is a detailed description of the methods used.

3. The third part of the report is a discussion of the results obtained.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a summary of the work done.

6. The sixth part of the report is a list of the names of the people who helped.

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than this additional rebate, which had not been credited. On the matter being brought to the attention of the proper officers of the plaintiff, the inadvertent mistake was corrected, and an additional \$25 credited to the defendant in his account on the books of the plaintiff. The defendant kept on taking beer according to the contract in February, 1912, and practically to the time he closed his business in March, 1912. There was no evidence in this case for the defendant to go to the jury with, and the Court did not err in instructing the jury for the plaintiff.

The abstract furnished by the plaintiff in error was insufficient and the cost of the defendant in error's additional abstract will be allowed. We are not, however, satisfied that the plaintiff in error sued out the writ of error merely for delay, and shall not assess damages on that hypothesis, as we are asked to do.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



October Term, 1913. No.  
102 - 19465

WILLIAM LOCCA ROHRER,  
Appellee,

vs.

BERTHA MANNING ROBERG,  
GUSTAV WILDOCA ROBERG,  
JESSIE CORNELIA ROHRER,  
On Appeal of BERTHA MANNING ROBERG.  
Appellant.

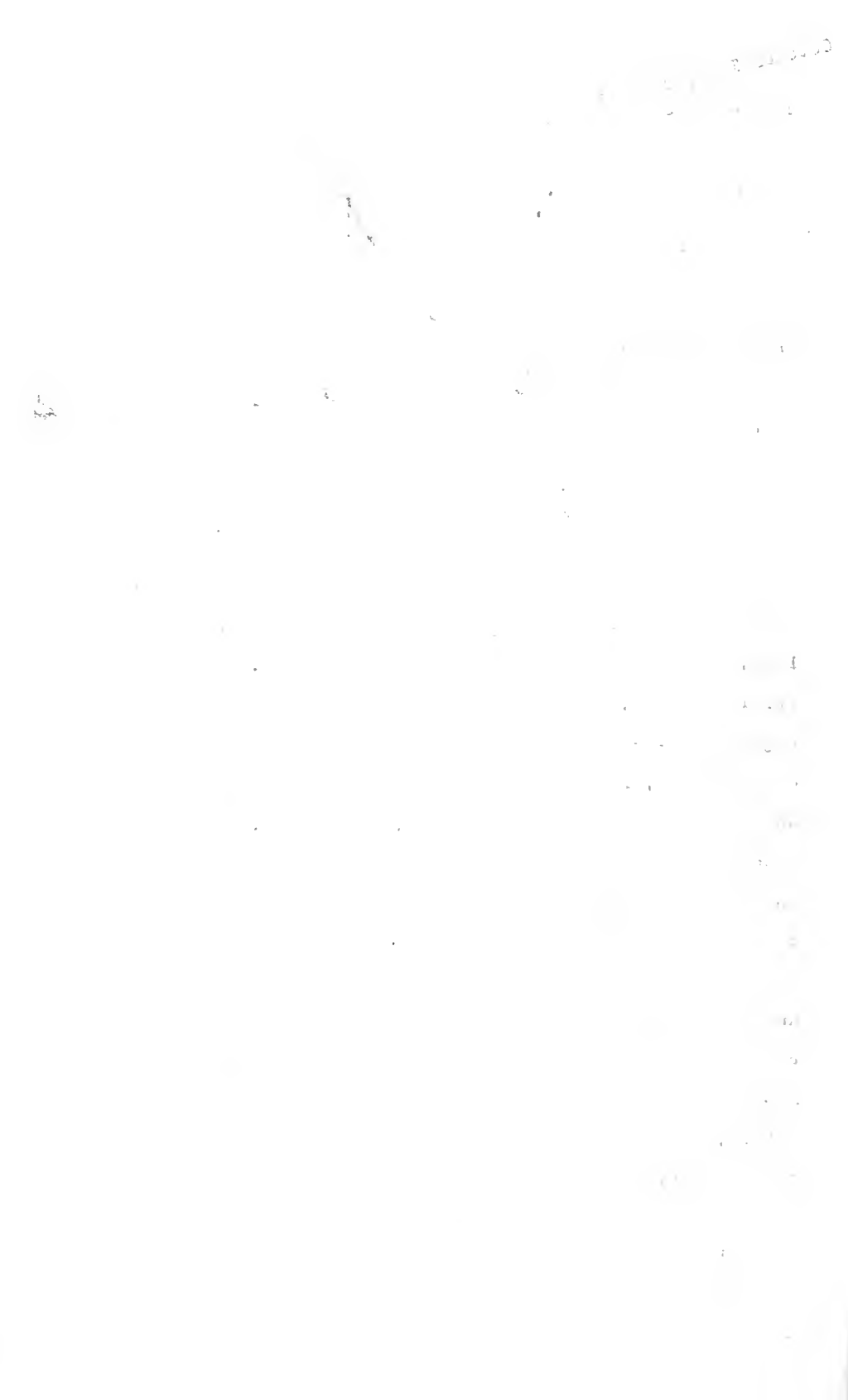
ALL A. FROM SUPERIOR  
COURT OF COOK COUNTY.

189 I.A. 172

L. J. HUBBARD, JUDGE OF THE COURT.

DELIVERED THE OPINION OF THE COURT.

The complainant below and appellee here filed a bill in equity in the Superior Court of Cook County June 24, 1912, setting up a contract with one Bertha M. Roberg dated April 29, 1911, for exchange of certain real estate in Chicago (on which was a residence, 1428 Dearborn Avenue) then owned by him, for certain real estate and certain buildings on leased ground in Santa Barbara, California, owned by Mrs. Roberg; also that Mrs. Roberg had defaulted on the contract and refused to carry it out, but had taken possession of and was residing <sup>on the Chicago property</sup> at 1428 Dearborn Avenue, Chicago, and that the complainant had after said default and refusal conveyed an undivided half interest in the Chicago property (at 1428 Dearborn Avenue) to his wife, Jessie Cornelia Rohrer, whom he made, with Bertha M. Roberg and her husband, Gustav Wildor Roberg, defendants to the bill. He prayed for a partition of the property between himself and J. C. Rohrer or a sale of it and division of the proceeds, and also for a money decree against Mrs. Roberg and her husband for the value of the use and occupation of said Chicago property, and that a receiver might be appointed to compel the payment of such rent for use and occupation or evict Mrs. Roberg and her husband from



said premises.

To this bill Bertha Manning Hoberg and Gustav Hildor Hoberg filed their joint sworn answer on September 18, 1912. The material matters in the answer were averments that the conveyance by complainant to his wife of an undivided one-half interest in the Chicago <sup>property</sup> was merely for the purpose of bringing a partition suit; that the possession of the Chicago property by the Hobergs was because it was turned over to them by the complainant's Chicago attorney on June 1, 1911, and that on June 25, 1912, the date of the deed of one-half interest to Mrs. Bohrer, the Hobergs were in possession of it, claiming ownership; denials that Bertha Manning Hoberg had refused to carry out the contract; allegations that various tenders of a deed to the Chicago property to Mrs. Hoberg or her representatives or to Hattie B. Manning, her sister, to whom it was agreed shortly after the contract was made the deed should run, were refused, because between July 13, 1911, (before which no tender was made) and January 18, 1912, the complainant had no title to convey, having deeded the property on the former date to one David Goehenbauer, and not having received a reconveyance until the latter date, and because certain interest on the mortgages on the Santa Barbara property and certain costs and expenses resulting from foreclosure proceedings on these mortgages had accrued, which the complainant refused to pay, although they "were occasioned by his delay in and subterfuges to avoid closing the deal"; and that after said date of January 18, 1912, tenders were refused because one was made of a deed to Bertha M. Hoberg instead of Hattie B. Manning, in whom it was agreed the title should be placed, and because when a deed to Hattie B. Manning was tendered the complainant refused, as before, to pay the expenses before mentioned; and further allegations concerning the performance by Bertha Manning Hoberg "of all the covenants in

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said written contract contained on her part to be performed", which need to be read in connection with the provisions of the contract and the allegations of the bill of complaint to have their effect clearly appear.

The contract provided that the Santa Barbara property was to be conveyed by Mrs. Hoberg to Rohrer subject to various leases, taxes, assessments, party wall agreements and building line restrictions and "to encumbrances aggregating nineteen thousand dollars." It also provided:

"That each party hereto is to furnish the other within a reasonable time from the date hereof either a complete merchantable abstract of title or merchantable copy thereof, brought down to cover this date, or merchantable title guaranty policy showing good and sufficient title at date of this contract in the respective parties hereto to the property hereby agreed to be conveyed by them."

Then follows in the contract the commonly used clauses, which in case an abstract was furnished gave the party receiving the same ten days to furnish a memorandum of objections to the title, if any, and to the other parties sixty days to remedy the same.

The bill of complaint had averred that prior to May 24, 1911, the complainant had caused to be delivered to Bertha M. Hoberg a complete merchantable abstract of title to the Chicago property, which Mrs. Hoberg had accepted on June 5, 1911, as showing a good title in complainant to that property, but that -

"Bertha Manning Hoberg wholly neglected and failed to perform her covenants in said contract contained; that she never furnished or offered to furnish to the complainant any abstract of title to any or all of said real property in Santa Barbara, California, or any merchantable copy of any abstract of title to all or any of said real property, or any title guarantee policy showing title in her to any or all of said real property; that at the time of the delivery of said contract there were encumbrances (including attachment liens, mortgages, interest thereon and taxes) upon said properties in Santa Barbara aggregating about \$24,000; that taxes amounting to about \$234 were then liens upon parts of said properties in Santa Barbara; that large amounts of accrued and past due interest upon said mortgages were unpaid at the time of delivery of said contract and \* \* no part of said liens, mortgages, taxes or in-



terest have been paid since the delivery of said contract."

The answer of the Lobergs thus treated this matter:

"These defendants aver that the said defendant Bertha Manning Loberg has performed all the covenants in said written contract contained on her part to be performed, that the abstracts of title to all of said property were shown to complainant and were delivered to the Abstract Company at Santa Barbara, California, and the continuations thereof were by said Company actually written up and said abstracts and continuances were in the month of June, 1911, there ready for delivery to complainant when he was ready to close the deal, and complainant was notified that said abstracts and continuances thereof were there for him until such such a time as he was ready to take them for examination.

These defendants further answering admit that at the time of the delivery of said contract there were incumbrances upon said property in Santa Barbara, California, including mortgages, interest thereon and taxes aggregating about twenty-three thousand dollars, \* \* but admit that no part of said mortgages or incumbrances have been paid.

\* \* \* \* \*  
These defendants further answering state that the defendant Bertha Manning Loberg in May or early in June, 1911, made all arrangements with the Commercial National Bank of Santa Barbara \* to furnish money necessary to reduce the encumbrance on said Santa Barbara property to nineteen thousand (\$19,000) dollars as agreed in said contract, and that said bank was at all times ready to pay said money when complainant was ready to close the deal, and that complainant was so notified. \* \* \* \* \* But these defendants aver that the complainant was himself not ready to produce a deed or close the deal."

November 30, 1912, the complainant filed an amended bill, which repeated the allegations, <sup>as then</sup> except as to the tenders of a deed made while Gochenhausen held the title to the Chicago property and prayers of the original bill, with the addition of a prayer for a declaration in the decree that the Lobergs have no interest in the Chicago property, and for the removal of the contract as a cloud, and of allegations purporting to explain or forestall the matters of defence set up in the answer to the original bill.

These allegations reassert that no abstracts of said Santa Barbara properties brought down to cover the date of the contract were ever furnished complainant, and that had said abstracts been brought down they would have disclosed encumbrances to the amount of more than \$23,000; that on May 30,

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1911, and June 30, 1911, the complainant requested the authorized agents of Mrs. Hoberg in the matter, Miss Manning and Mr. Carrier, to reduce the encumbrances to \$19,000 and bring down and furnish said abstracts, which was never done, and that prior to July 1, 1911, more than a reasonable time to so reduce the encumbrances and bring down the abstracts had elapsed; that on July 5, 1911, the complainant elected to rescind the said contract for the failure of Mrs. Hoberg to furnish an abstract of title and for failure to reduce the encumbrances to \$19,000, and so notified her on that date; that on or about June 1, 1911, Mrs. Hoberg, without the consent of the complainant, had taken possession of the Chicago house, which she has ever since retained; that she is insolvent and unless a receiver is appointed, pendente lite the rent of said property will be lost to complainant and his wife; that on July 7, 1911, being then unaware that Mrs. Hoberg had taken possession of the Chicago house, and having notified her of his election to rescind the contract, and fearing that she might file said contract for record and cloud the complainant's title, he had executed a deed of the premises to one David Gochenhauer "for the sole purpose of preventing such clouding of his title, and that from the time of making said last mentioned deed said Gochenhauer held the title to said premises in trust solely for complainant and on complainant's request said Chicago premises were reconveyed by Gochenhauer and wife to complainant on January 18, 1912, which deed was recorded", etc., on January 24, 1912. After this the complainant avers he made tenders of deeds conveying said property, first, to Mrs. Hoberg and then, at her request, to Miss Manning, and they refused to carry out the contract unless the complainant would assume all interest accrued on

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\$19,000 of said encumbrances since the date of the contract, and all costs of two foreclosure suits which had been brought against the California property after the date of the contract, without allowance to the complainant for rents of said California property or the use of said Chicago property, which he declined to do.

To this amended bill the defendants Bertha Manning Loberg and Gustav Hilder Loberg were on said November 30, 1912, ordered to plead, answer or demur by December 5, 1912.

The solicitor of record for the Lobergs consented to this order and endorsed his approval of it on the draft before it was entered. There is no record of any extension of time for this answer.

December 20, 1912, a receiver pendente lite of the Chicago property was moved for and the Lobergs were present in court and presented affidavits in opposition thereto. The Court found (without prejudice to a contrary finding on the hearing) that the failure of the parties to consummate the contract of April 29, 1911, resulted wholly from the default of Bertha Manning Loberg or her agents; that Bertha Manning Loberg entered into possession of the Chicago property on or about June 1, 1911, and had ever since been in possession thereof and had never paid any rent therefor and was insolvent. The Chicago Title & Trust Company was appointed receiver and Bertha L. Loberg ordered to surrender possession or make a lease with the receiver.

January 21, 1913, notice was served on solicitors for the Lobergs that on January 22, 1913, an order defaulting the Lobergs for failure to answer the amended bill would be asked for. January 22, 1913, an order was made by the Court





entering the default of the Hobergs and taking the amended bill as confessed against them.

January 29, 1913, a motion was made to vacate said order, supported by several affidavits - <sup>those of</sup> those of A. H. Chetlain and J. J. McObbe <sup>Ed</sup> referring only to the service of the notice on January 21, 1913, and those of Emilie C. Hoeder, Charles F. Carrier, Mattie L. Manning, George M. Edwards, Genevieve Foulkeoux (all residents of California), and of Wilder Hoberg and Martha Manning Hoberg, <sup>and others</sup> referring to the merits of the case as set forth in the bill, answer and amended bill, and all made during November or December, 1912. Also in support of said motion the counsel for the defendants (Hobergs) read as an affidavit the sworn answer they had made to the original bill and an answer which they had prepared to the amended bill and desired leave to file. —

These affidavits and the proposed answer (which was sworn) did not, as we shall hereinafter indicate, materially alter or add to the allegations of the answer to the original bill on the matters on which the cause must be decided. The Court denied said motion on said January 29, 1913, and afterward on February 13, 1913, denied a motion to vacate said order of January 29, 1913. A recital in the certificate of evidence on the hearing of this motion is -

"The foregoing affidavits, answer filed September 18, 1912, as aforesaid, said notice, letters and rule of court were all received in evidence and considered by the Court. The Court duly considered the answer proposed to be filed by said defendants and the admissions therein contained. The foregoing was all the evidence heard, offered or considered by the Court. And thereupon and on the 20th day of January, 1913, the motion of said defendants to vacate said order defaulting said defendants, Martha Manning Hoberg and Gustav Wilder Hoberg, and taking the amended bill as confessed against them, was denied by the Court for the reason that the said affidavits and sworn answer to the original bill failed to show that defendants, Hoberg, had any defence to the amended bill."

On February 18, 1913, a decree was entered by the Circuit Court, and afterwards in points unnecessary to



state here amended by consent of all the parties to the suit. From this decree this appeal was taken by Bertha L. Hoberg to this Court.

The decree in its findings follows and repeats all the allegations of the amended bill, and orders and decrees that the contract between Bohrer and Bertha L. Hoberg be set aside as a cloud upon said premises at 1826 Dearborn avenue, Chicago, and orders a partition to be made between the Bohrers and that in consideration of the amount which Mrs. Hoberg should pay for use and occupation of the Chicago premises from June 1, 1911, as against taxes thereon paid and repairs and improvements she has paid for or become liable for, she should pay the complainant \$487.21 and Mrs. Bohrer nothing.

The assignments of error made by the appellant call in question the findings and orders of the decree of February 18, 1911, and the entry of the order of default and of taking the amended bill pro confesso and the refusal to vacate the same.

We see no reason to disturb the decree. When the default was taken the defendants were forty-eight days in default in answering the amended bill, according to a consent order to which they had agreed. They cannot complain of the default, notwithstanding that an answer to the original bill was on file. The rule that a default should not be taken to an amended bill when an answer to the original bill is on file has no application to a case like this, where an amended bill is filed and a consent order ruling the defendant to plead and giving him a certain time to do it is entered. Such a consent by the defendant is equivalent to an abandonment of the original answer.



Gettings v. Buchanan, 17 Montana, 581;  
 Machine Company v. Redfield, 18 Kansas, 355;  
 Leawall v. Crawford, 55 Fed. Rep., 729;  
 Robinson v. Leys, 28 Tenn., 144.

Nor do we think that the defendants could justifiably complain that it would have been an abuse of the discretion of the Chancellor had he refused to set aside the default entered on January 24, 1913, without consideration of the defence made by the affidavits and the draft of the new answer presented.

The evidence shows no excuse for the delay in filing an answer to the amended bill. After agreeing to a period of five days to file the answer the defendants had not done so in fifty-three, although in the meantime their counsel had been reminded of it by request of the counsel for complainant and still more forcibly by the hearing on a motion for a receiver pendente lite. No want of diligence is shown in the attempt to vacate the order after it was entered, but this is not sufficient. Some excuse for the preceding delay is necessary to render the denial to vacate an abuse of discretion.

Hartford Life Ins. Co. v. Bossiter, 196  
 Ill., 278.

This might well excuse us from considering the case made by the pleadings, actual and proposed, and by the affidavits which the defendants offered on the motion to vacate the default. But inasmuch as the Chancellor below based his refusal to open the default, not on the want of diligence or excuse in offering the answer, but on the want of a meritorious defence shown by it, or by the affidavits heard on the motion, we have ourselves examined both the proposed answer and the affidavits carefully and have reached the same conclusion as



that to which he came.

It is not necessary to discuss the elaborate arguments that are made on each side concerning the details of the negotiations - propositions and counter propositions that occupied so many months. For do we care to do more than mention (and that in order to avoid any misconception of our position; the point much insisted on by the appellee, that it was shown that the appellant was relying on placing an incumbrance on the Chicago property which she was to get under the contract for her ability to reduce the existing incumbrance to the stipulated amount on the California property which she was to convey. We do not think it was so shown. The somewhat indefinite statements of the affidavits about the loan that Mrs. Heberg was to get from the Bank at Santa Barbara and other things shown by the affidavits might lead to a suspicion that this was her expectation; but the affidavit of Miss Manning, which appellee interprets as so stating, does not, to our mind, naturally bear this construction. Miss Manning says: "Prior to his (complainant's) coming up in June, 1911, I had arranged with the Santa Barbara Savings & Loan Bank to borrow sufficient money to reduce the indebtedness of my sister to \$19,000 upon the property the subject of the exchange."

Counsel for appellee construe this as though the affidavit had said, "I had arranged to borrow sufficient money upon the property the subject of exchange to reduce the indebtedness of my sister to \$19,000". But this is not what she said. The collocation of the words make a great difference and the affidavit certainly may just as well mean, "I had arranged to borrow sufficient money to reduce the indebtedness of my sister upon the property the subject of the exchange to \$19,000."





Certainly if it were necessary for either to allow his property in Chicago to be incumbered before he could receive the deed to the equities in Santa Barbara for which he was bargaining, there could be no question that he was not being treated according to the stipulations of the contract; but we have not, in considering the case, assumed that such was the case. Independently of that, however, by the proposed answer and by the affidavits no sufficient compliance with the contract on the part of Mrs. Toberg was shown at any time to qualify her to object to Rohrer's rescission of it and his establishment of the status quo ante by this proceeding.

The contract explicitly provided that within a reasonable time each party was to furnish the other with a complete merchantable abstract of title or merchantable copy thereof or merchantable title guarantee policy and the good and sufficient title at date of the contract in the respective parties. First to the property agreed to be conveyed by them. As the property to be conveyed by Mrs. Toberg was to be subject to incumbrances aggregating \$19,000, this was equivalent to saying that if an abstract was furnished it should show the title in that condition in Mrs. Toberg or where she could control it. She furnished no abstract at all according to her own admissions and those of her agents. To say, in the language of the proposed answer, that "abstracts of title to all the said property were shown to complainant and were delivered to the Abstract Company in Santa Barbara, California, and that continuations thereof were by the said Company actually written up and said abstracts and continuances were in the month of June, 1911, there ready for delivery to complainant, lacking only the certificates and signatures of the Company, when he was ready to produce a proper deed to the premises in question and close the deal",



is not to allege a compliance with the provisions of the contract before quoted. But in any event it is expressly admitted that the abstracts if offered would not have shown the aggregate of \$19,000 of encumbrances only, but a greater sum.

When one of the parties has furnished his abstract showing a good title and the other fails to do so by the time fixed in the contract, or within a reasonable time, if that is the agreement, the party not in default may treat the contract as terminated and maintain a bill to remove it as a cloud.

*Howe v. Hutchinson*, 105 Ill., 301;

*Hutchinson v. Conly*, 209 Ill., 437-442;

*Tyce v. Littus*, 199 Ill., 129-130.

We think that the appellant showed neither diligence nor a meritorious defence, and therefore was not entitled to have her default opened.

The decree followed the amended bill properly taken pro confesso and is affirmed.

APPEAL.



October Term 1954  
155 - 19544  
1954

JAMES J. LOUGHLIN doing business  
as JAMES J. LOUGHLIN & Co.,  
Defendant in Error.

vs.

H. HEILEMAN BREWING COMPANY,  
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT  
OF CHICAGO.

199 I.A. 176

W. FRANKLIN JOHNSON SHOWN

DELIVERED THE OFFICE OF THE CLERK.

This is a writ of error to reverse a judgment of the Municipal Court of Chicago for \$314.35 entered April 17, 1913, in favor of James J. Loughlin (doing business as James J. Loughlin & Co.), plaintiff below and defendant in error here, against the H. Heileman Brewing Company (a corporation), defendant below and plaintiff in error here.

There is no question but that the plaintiff below was entitled to payment of the amount of this judgment from somebody, for plumbing work. The question at issue in this case was and is merely whether the defendant, the H. Heileman Brewing Company, is liable for it, or one Jack Johnson, pugilist and saloonkeeper, is alone responsible. Out of greater caution perhaps the plaintiff originally sued both jointly, but subsequently dismissed the suit against Johnson and proceeded to judgment against the brewing company alone.

The transcript from the Municipal Court records the default of Johnson in this way: An order of January 24, 1913, after reciting a rule upon Johnson to appear instantler and him being called in open court, and also service of process "a sufficient number of days prior to the time required of said defendant to appear as aforesaid to now require of said defend-



ant that said defendant either appear in this cause at this time or that said defendant suffer judgment by default for want of such appearance", proceeds; <sup>as follows.</sup>

"It is on motion of the plaintiff ordered by the Court that judgment be entered herein against the defendant John A. Johnson by default for want of an appearance."

No further order or judgment was made by the Court concerning Johnson until April 17, 1913, when

"the plaintiff moves the Court that the default of the defendant, John A. Johnson, entered herein on the 24th day of January, 1913, be vacated and set aside, which motion the Court sustains and the same is hereby vacated and set aside and for naught esteemed."

The defendant Brewing Company insists that the plaintiff having made his election to proceed to judgment against an alleged agent, Johnson, that election was final and he could not thereafter hold the alleged principal. To quote from the brief for plaintiff in error -

"The entry of the judgment against Johnson was a bar to the suit against plaintiff in error, and the Court should have so found."

It is not necessary to pass on the general doctrine here propounded, for we hold that in the sense in which "judgment" must be used to make the question serious, there was no judgment against Johnson by the order of January 24, 1913. It was a mere order of default, inartificially expressed, as the records of the clerks of the trial courts too frequently are, as we find.

If it was, as we hold, equivalent merely to the entry of default, the citations made by counsel for plaintiff in error are authority against rather than in favor of his contention.

The merits of the cause we think are plainly with the plaintiff, the defendant in error in this Court.

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There is, in our opinion, sufficient evidence tending to show that the authorized agents of the defendant Company having made an agreement of the usual kind with Johnson concerning his exclusive use of their beer in his saloon, agreed to make improvements and arrangements there, of which, by fair intentment, this plumbing work should be considered a part; that the same agents, when the necessity of this particular work arose and was mentioned, expressly authorized Johnson to have it done; and that they, as it was being done, superintended it by the intervention of persons to whom such actual superintendence was usually entrusted, and paid a part of the bill on the approval of Johnson. Moreover, it seems to us that such payment was made under circumstances and in a manner that ratified Johnson's undertaking for them.

The fact that in the written contract with the plaintiff Johnson did not mention the defendant company is but one fact in favor of the defendant's contention, and by no means conclusive. Johnson swears that he explained to Loughlin the situation and told him that the Brewery was liable and would pay him. Loughlin at the time the partial payment was made to him of \$200 made his bill to Walter C. Mueller, Manager, (Mueller being Manager of the Brewing Co.), and itemized it as being due "on contract" and as "per terms of the contract", "for sewer work at Jack Johnson's Cafe". The bill was held, considered and paid. - a circumstance which though also not conclusive, tends rather to corroborate the direct evidence which was offered for the plaintiff, than the somewhat general and in some respects unsatisfactory testimony presented denying the authority.

The cause was tried below by the Court without a jury, and we think the conclusion reached was justified.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



WILLIAM McMURRAY, F. P. BETTY  
and J. E. FRANKLIN, doing business  
as the BANK OF BIG WELLS, TEXAS,  
Defendants in Error,

vs.

E. GEORGE & COMPANY, a corporation,  
Plaintiff in Error,  
and  
NATIONAL PRODUCE BANK OF CHICAGO,  
a corporation.

ERROR TO THE  
MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 182

MR. PRESIDING JUSTICE BROWN  
DELIVERED THE OPINION OF THE COURT.

This is a writ of error sued out to reverse a judgment for \$822.50 rendered by the Municipal Court of Chicago on May 16, 1913, in favor of the plaintiffs below and defendants in error here, who do business at Big Wells, Texas, as the "Bank of Big Wells", and whom we shall so denominate in this opinion. The judgment was against E. George & Co., a corporation doing business in Chicago. The cause was tried below by the Court without a jury. It has been orally argued before us as well as presented by printed briefs and arguments, and we indicated on the oral argument our conclusions. It is therefore entirely unnecessary to elaborate them here.

Careful consideration of the record produces a conviction that the facts can bear but one construction, and that favorable to the plaintiffs and requiring an affirmance of the judgment below. We think it proven that an authorized agent of the defendant corporation for that purpose, one A. McNamara, bought at the Byrd Cattle Company Ranch, a shipping point in Dimmitt County, Texas, four hundred and seventy crates of fancy onions for the defendant corporation, that he bought them as he was authorized to do for \$1.75 a crate, which



was to be paid at once; that he inspected and accepted the onions, as again he was authorized to do; that the onions were delivered f. o. b. at the railroad switch at the Byrd Ranch, according to the bargain which George & Co's agent made; that they have never been paid for, and that the claim for them has been duly assigned to the plaintiffs, the Bank of Big Wells, Texas, and that the assignees are suing for it in this action, as under the present statute they have a right to do.

This being our view of the facts, the various defences set up need no discussion. They are based on an entirely different view of the transaction, which we think finds no support in the evidence. But even on the theory of a "consignment for sale", which the defendant insists on, no satisfactory defence was made out. We are forced to the conclusion that the objection to payment had no better basis in any theory than the drop in the market for "fancy onions."

The judgment of the Municipal Court is affirmed.

AFFIRMED.



OCT 14 1913

229 - 19619

WALTER S. BOGLE,  
Defendant in Error,  
  
vs.  
  
L. WEBER,  
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT  
OF CHICAGO.

1-13

MR. PRESIDING JUSTICE BROWN  
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago to reverse a judgment for \$22.50 rendered by that Court May 24, 1913, (on a trial without a jury) against the plaintiff in error here, defendant below, Weber, and in favor of Bogle, defendant in error here and plaintiff below. The action was in tort and as stated in the "Statement of Claim" - "for the reasonable value of repairing the walls in the halls of the building owned by the plaintiff at 668 Roscoe street, Chicago, Illinois, which were damaged by defendant or her agent in moving defendant's furniture from said building on or about May 1, 1912".

The walls damaged were the halls of a building in which defendant had leased apartments from the plaintiff. Her lease being about to expire she made, as the stipulation of facts on which the case was tried, states -

"a contract with Murphy Bros. to remove her said furniture from said apartment and agreed to pay and did pay Murphy Bros. a certain specified sum of money for moving all of said furniture and Murphy Bros. agreed to move said furniture without damaging the same and to deliver said furniture safely at another apartment.

Murphy Bros. was a firm or copartnership having an office and place of business in the city of Chicago and were engaged in the business of drayage and teaming. Prior to the making of the contract aforesaid, the defendant had never employed Murphy Bros. in any capacity and had had no business relations with Murphy Bros. Defendant gave no directions as to the manner of moving said furniture to Murphy Bros.; the said contract providing simply that Murphy Bros. at its own risk so far as defendant was concerned should move said furniture from said apartment and receive as compensation therefor the said price agreed on."





it was further stipulated that Murphy Bros. were careless in moving the said furniture and in so doing damaged the walls in the halls of said apartment building, and that if the plaintiff was entitled to recover at all against the defendant he was entitled to recover \$22.50.

We think he was not entitled to recover. Many decisions are cited by each side to this controversy, but we think they are many of them in each case beside the point. The question does not turn upon "control of premises" or the stipulations of a written lease for the restoration of premises in good order, but whether the facts stated in the stipulation make the defendant liable for Murphy Bros'. negligence not in her premises, but in the hallways of the apartment house. As we have said, we do not think they do. Murphy Bros. were independent contractors, and were therefore, like any other third persons who came and went through the halls, liable for their acts and defaults which damaged them. The facts stated did not make the men who moved the furniture agents and servants of the defendant. They were, according to the facts stated in the stipulation, independent contractors or the agents and servants of independent contractors. The business was not inherently dangerous or a nuisance, and the defendant as a matter of law was not liable.

The judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs will be entered here against the defendant in error.

REVERSED.



JOHN D. CASEY, Administrator,  
etc.,

Plaintiff in Error.

vs.

CITY OF CHICAGO,

Defendant in Error.

ERROR TO CIRCUIT COURT

OF CLACK COUNTY.

189 I.A. 188

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error in this case is the administrator of a child of five years. He sued in the Court below to recover damages for the death of his child under the Campbell Act of Illinois. The declaration charged that the City of Chicago negligently permitted a street in the City of Chicago to be and remain in an unsafe and dangerous condition in that it had a hole in it which made it rough and uneven, by means whereof the plaintiff's intestate, one Harold Budil, "was struck and injured by a cake of ice which fell from a wagon because of the said wagon running into said depression and hole in said street." The cause was tried before a jury, who found for the defendant, and the Court, after a motion for a new trial and a motion in arrest of judgment had been made and overruled, entered a judgment of nil capiat and for costs against the plaintiff. *By reverse the judgment of the Circuit Court is reversed.* From this judgment he has appealed to this Court, *plaintiff charged as grounds for reversal* signing as errors that the Court admitted improper evidence and excluded proper evidence; that it erred in giving certain instructions and in refusing certain tendered instructions.

We think this case must be remanded, and as it will probably be retried we shall not comment on the evidence. This opinion is not to be taken as expressing any conclusions



as to the merits of the case or the law applicable thereto beyond the matters expressly stated therein. But as the defendant below, the defendant in error here, maintains that errors in instructions and in rulings on evidence are not material, for the reason that the jury should have been instructed peremptorily for the defendant, we are obliged to note our dissent from this position.

The City was under a duty (under certain general limitations and conditions) to keep the street not only in a reasonably safe condition for ordinary travel, but also, as plaintiff rightly contends, for children at play using the streets in a manner common and usual for children in a city.

City of Chicago v. Major, 18 Ill. 349-361;

City of Chicago v. Peefe, 114 Ill., 222-231;

City of Chicago v. Cohen, 139 Ill. App. 244.

This being the case, it is also true that if negligence on the part of the city were proven, the negligence of the driver of the ice wagon, if it existed, did not excuse that negligence of the city if that were a proximate cause of the accident. It need not be the sole or exclusive proximate cause, but it must be a proximate cause, either alone or concurrently with some other.

In order that the plaintiff should have a fair trial of his cause it was essential that in some way the instructions should have been directed to the end of stating these propositions. But by giving the 18th of the instructions requested by the defendant, which asserted that if the jury believed from the evidence that the street in question was reasonably safe for ordinary travel the jury should find the defendant not guilty, and instruction 2 of the same series, which says that before the jury can find the defendant guilty



it must find from the evidence that such negligence was "the" (not "a") proximate cause of the accident; and at the same time refusing to give at the request of the plaintiff the instruction "numbered one" as follows:

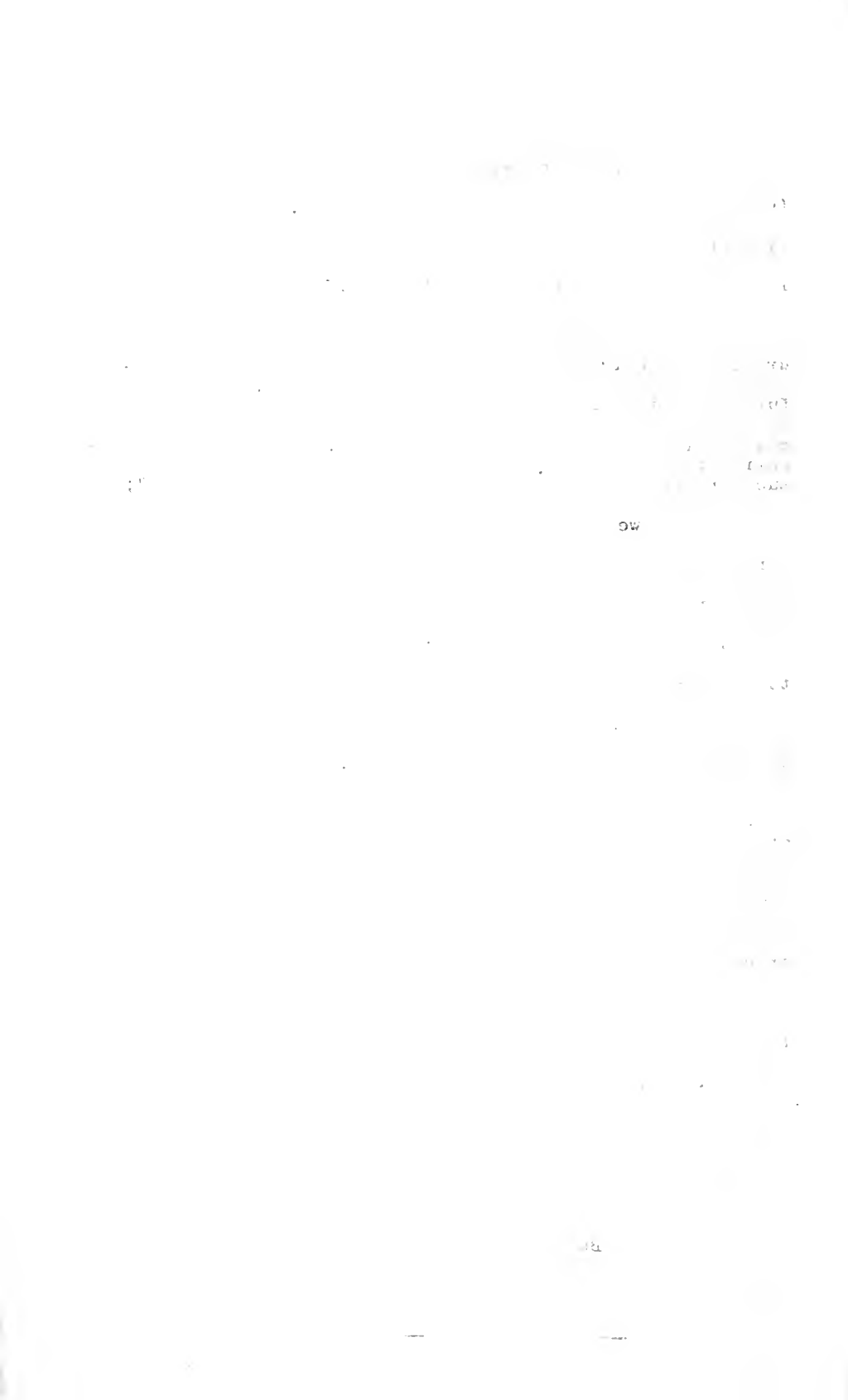
"You are instructed that though you may believe from a preponderance of all the evidence that the driver of the ice wagon was guilty of negligence contributing to the death of plaintiff's intestate, still if you further believe from a preponderance of all the evidence that the City of Chicago was also guilty of negligence as charged in the plaintiff's declaration, proximately contributing to plaintiff's intestate's death, the negligence of such driver would be no defense to the City of Chicago";

we think the Court failed to present to the jury fairly the legal propositions which were material to a proper consideration of the issues, made by the pleadings and the evidence. It is for this reason that we feel obliged to reverse the judgment and remand the cause for a new trial.

Complaint is made of other instructions, but we do not deem them reversibly erroneous.

If the clause in the second instruction, given at the request of the defendant, which instructs the jury "that a person or corporation is not liable or responsible for injuries or accidents which could not have been foreseen or expected by a reasonably prudent person as a result of its negligence" stood alone it certainly would not state the law correctly, for, as is said in *City of Dixon v. Scott*, 181 Ill. 116, "It would be very unreasonable to make the liability of the defendant depend on the question whether the precise injury complained of and the manner of its occurrence ought to have been foreseen."

But the following clause in the same instruction so explains or develops this preceding clause by speaking of "any accident or some accident", that, although we do not consider the instruction happily worded, we should





not reverse the judgment on account of it.

The objections to instruction 10 are only well founded so far as this - "reasonably" instead of "ordinarily" would be the better word to use. The other objection made to instruction 10 and that to instruction 15 we think hypercritical. Instruction 17 was correct. The part of the coroner's verdict which purported to determine that the condition of the pavement at the crossing caused the ice to fall from the wagon was not competent evidence for the jury to take into consideration.

*Booster v. Shepherd*, 258 Ill., 164, 18, we think, fairly in point as authority for this rather than the opposite position.

As for the reception of the photograph in evidence, the exact situation is perhaps not like to occur at another trial. Other or different evidence may very possibly be produced to identify it. But we do not think its admission heretofore was erroneous.

The judgment of the Circuit Court is reversed and the cause remanded to that Court.

REVERSED AND REMANDED.

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October Term, 1913

YAHON COOK AND SUELLY COMPANY,  
a corporation.

Defendant in Error.

vs.

ISAAC COHEN,

Plaintiff in Error.

COURT OF COMMON PLEAS

COUNT OF 11 LEASE.

189 LA. 130

MR. JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

There is very little to be said about this case.

The plaintiff below, defendant in error here, brought suit in the Municipal Court against the defendant below, the plaintiff in error here, on an account stated. The "state out of claim" as finally amended described the demand as -

"For \$200 being an account stated and rendered and balance agreed upon between plaintiff and defendant on or about the 28th day of December, 1912."

The defendant in his amended "affidavit of merits" denied that there was any "account stated" or "balance agreed on" at any time, and denied that he was indebted to said plaintiff in any amount for the said.

This issue of an "account stated" & in other words whether it had been admitted by the defendant on an inspection and consideration of the account of the plaintiff against him that he owed the amount which it showed due - was tried before the Court without a jury, and the Court found in favor of the plaintiff and gave judgment for \$200 June 28, 1913. The defendant sued out this writ of error and applied for a supersedeas, which was decided on an inspection of the record by one of the Judges of this Court in vacation. The Court has now considered the record and comes to no different conclusion from that then formed by the Judge to whom the application was made. The question was one of fact and was decided correctly by the Court below.



There was evidence enough to warrant the judgment without the telephone conversation which defendant says was inadmissible. If it had been, it might be presented the Court, hearing the case without a jury, disregarded it. But it was admissible. The weight was for the Court, but the fact that the speaker announced himself to the witness as "Ike Cohen", the defendant, and declared his intention of making a part payment by check of a particular and uneven amount the next morning, followed by the reception of a check for that exact amount next morning, tends to establish his identity as announced and makes the evidence competent.

Cedar v. Mrs. Nat'l Bank, 220 Ill., 572;

Collopy v. Singer Sewing Machine Co.,

177 App. 18.

There was no error in the rulings which excluded certain testimony about the quality of the coat. That quality was not the issue on trial.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



301 - 19699

WALDOMAR SELMIN,  
Defendant in Error,

vs.

LATROBE STEEL & COUPLER  
COMPANY, a corporation,  
Plaintiff in Error.

APPEAL TO SUPREME COURT  
OF COOK COUNTY.

189 LA. 191

STATEMENT BY THE COURT.

This writ of error is brought to reverse a judgment for \$25.00 rendered (on the verdict of a jury, by the Superior Court of Cook County April 19, 1913, in favor of Waldomar Selmin, the plaintiff below and defendant in error here, against the Latrobe Steel and Coupler Company, the defendant below and plaintiff in error here. The action was for personal injuries to the plaintiff resulting from the alleged negligence of the defendant corporation. It was begun November 11, 1910. As amended the declaration on which the cause was sent to the jury consisted of two counts. The first of these alleged: That the defendant on May 16, 1906, "owned, possessed, managed, operated and controlled" a machine for testing iron couplers, consisting of a heavy hammer, to which hammer was attached at the top thereof a certain chain, which chain fastened by a hook, by which hook and chain the hammer was raised for the purpose of causing it to descend and strike the material placed beneath it and thereby test the strength of said material; that at that time the plaintiff, then a minor of tender years and a Russian subject, was working for the defendant as a servant; that the defendant, by its foreman, "who was not a fellow servant of plaintiff and to whom plaintiff owed the duty of obedience, carelessly and negli-





gently fastened said chain on said hammer in an insecure and unsafe manner, and so that said hammer was likely to become unfastened and fall by reason thereof and without any act on the part of the operator of said hammer to cause it to fall", which defendant knew, etc., and plaintiff did not know, etc., "and while plaintiff at all times in the exercise of ordinary care and caution for his own personal safety and in performance of his duty to said defendant as a servant as aforesaid, was in the act of placing a certain knuckle under said hammer for the purpose of testing the same, said hammer became unfastened from said chain and hook <sup>by</sup> and through the carelessness and negligence of said defendant as aforesaid, and fell to and upon the hand of plaintiff", thereby severing the fingers from the plaintiff's hand.

The other count alleges that the defendant by the foreman who was not a fellow servant, etc., "carelessly and negligently ordered plaintiff to place a certain knuckle under said hammer for the purpose of testing same, while the chain and hook upholding said hammer was weakly, insecurely and insufficiently fastened and so that said hammer was likely to fall by reason thereof without any act of the operator to cause it to fall, which defendant knew or by the exercise of due care ought to have known and which plaintiff did not know and did not assume the risk thereof, and could not have known by the exercise of ordinary care", and that while the plaintiff was, in obedience to said order, placing a knuckle under said hammer, etc., the hammer, by reason of the aforesaid negligence of the defendant, fell on his hand.

Besides the general issue, which was pleaded to this declaration, a plea of the Statute of Limitations was filed, to which an amended replication was made by leave of



*The replication*  
 court during the trial. It was in effect that the suit was brought before the plaintiff had come of age. A traverse of this, it was stipulated, might be considered as filed thereto, but seems not to have been urged, the fact appearing in the evidence to be as the replication stated. The assignments of error in this Court include a contention that an issue was by said amended replication submitted to the jury which it had not been sworn to try. But this was not argued.

A trial of the cause before a jury began March 31, 1913, and terminated by a verdict for the plaintiff in the sum before mentioned April 2, 1913. On this last day before the cause was finally taken by the jury, one of the counsel for the defendant moved the Court in its behalf to suspend the trial of the cause until the next day to enable the defendant to present the testimony of one C. E. Heywood. This motion was supported by affidavit of the counsel that Heywood was a material witness for the defense, and that he expected him to testify to certain matters (set forth in the affidavit), and that Heywood resided in Pittsburg, Pennsylvania; that he had started from there April 1, 1913, to come to Chicago to testify in the cause, but had telegraphed that his train was delayed and that he would not arrive in Chicago until about 5 p. m. on the second. Tuesday, April 1, being a legal holiday the Court had not convened. Counsel for the plaintiff consented that the counsel for the defendant might state to the jury that the defendant claimed that the witness would testify as stated in the affidavit, but refused to admit that the witness would testify to all the matters mentioned therein, specifying those which were thus excepted. The motion to suspend or continue was then denied. The entire affidavit of counsel was read to the jury by him, but he indi-



cated the parts which stated what the plaintiff refused to admit the absent witness would have sworn to.

A written motion for a new trial and a motion in arrest of judgment were made after the verdict and before the judgment and overruled. *To reverse a judgment based on the verdict defendant prosecutes a writ of error.*

In this Court the defendant has, under its assignments of error, insisted on these positions:

First. That there is no evidence in the record tending to prove that the defendant was guilty of the negligence charged in either count of the declaration on which the cause was submitted to the jury.

Second. That if it can be held that any negligence was shown, it must have been the negligence of plaintiff's fellow servant, for which the defendant is not liable.

Third. That the plaintiff was guilty of contributory negligence which must prevent his recovery.

Fourth. That the plaintiff assumed the risk of the danger which resulted in the injury.

Fifth. That the Court erred and abused its discretion in denying the plaintiff's motion to suspend the trial in order to procure the attendance of the witness Maywood.

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J. J. FALLIDINE JUSTICE BACH  
DELIVERED THE OPINION OF THE COURT.

The assignments of error in relation to the allowance of an amended replication to the plea of the Statute of Limitations must be considered as waived, not having been argued. We do not consider them well taken in any event.

The undisputed facts of this case, pausing for the moment the pleadings therein, to our minds plainly indicate a meritorious cause of action in the plaintiff and a liability on the part of the defendant corporation.

A youth hardly turned of sixteen, but a month or two in the country and without knowledge of English, was set to work on a machine which consisted of a hammer weighing three quarters of a ton, and made to fall on or towards an anvil from an elevation of some feet, for the express purpose of seeing whether it would break to pieces a piece of cast steel of a peculiar shape, weighing sixty-nine pounds, placed on the anvil. His work was largely at least lifting these pieces of cast steel, called knuckles, from the floor and placing them on the anvil under the hammer.

It is suggested that it was contributory negligence or a want of ordinary care for him, in placing the knuckles on the anvil, to so dispose of his fingers or any part of his hand where, if the hammer fell unexpectedly, it would touch them; but this, after an inspection of a specimen of the knuckles introduced as an exhibit in this case, does not appear to us as reasonable. In the first place, we think it practically impossible that in such dealing with lumps of steel of about 70 pounds weight, the course indicated as the careful one could generally be followed; and in the second, it is





agreed that when the hammer fell it would so frequently break the knuckle into fragments that care for safety required something more than a different arrangement of the fingers or hands on the casting. They must not be at or near the casting at all at that time, which means that the hammer must never be allowed to fall unexpectedly, if safety was to be considered. It was of course the intent and theory concerning the machinery that it never should. When the hammer was going to fall, mere proximity to it was dangerous unless one was protected by a partition boarding or a guard of some sort.

The utmost that can be properly argued concerning contributory negligence in this case is that it was a question for the jury whether plaintiff was guilty of it. In at least five of the nineteen instructions given by the Court the jury was fairly and properly instructed on it, and the doctrine concerning it and due care given to them as favorably as the defendant could or did ask.

The true and essential cause of the injury which the plaintiff received was not the particular position of his hand on the casting, but the fact that this sixteen hundred pound hammer did fall unexpectedly. It was so geared as to fall automatically and of course expectedly when it reached in its elevation a certain height. It ought not to have fallen or dropped until it did reach that height and not a "trip". It did fall when this accident happened before it had been raised a fifth of the distance to the "trip".

As the defendant's witness and foreman Varabough testified, record 120, "It didn't trip at the place where it should have tripped. It dropped. The plaintiff didn't know it was going to drop. I didn't know it. I hooked it in myself. I don't know what made it drop. I hooked it in. I was the boss. I was familiar with the situation there." Again he



testified: "The automatic brake held, the hammer dropped from the hook and the cable still remained where it was holding the hook."

"Of course the machinery should have been of such a character and so managed that this would not have happened. Its mere happening, however, might not show negligence or carelessness on the part of the defendant towards its employees engaged about the machine, had this been the first time that it had happened. But here are questions put to the same foreman and his answers on cross examination:

Q. And this was the first time it ever dropped?

A. No, I don't think it was the first time it ever dropped.

Q. Was it the second time? A. No, it was not the second time.

Q. How many times did it drop? A. Probably three or four times during the year that I was there. I was there about a year or a little more.

Q. How many times did it drop while the plaintiff was there? A. I do not believe it ever dropped except the time he got caught.

Q. Are you certain of that? A. I feel pretty certain.

Q. Could you put that hook in there more than one way? A. No sir.

Q. Couldn't you put it in so that it was not in quite far enough? A. No, I don't think you could.

Q. But whether you put it in right or wrong, it was liable to drop anyway? A. I think so, if it---

Q. That is all. A. I could scarcely tell whether it was going to drop or not so far as I was concerned.

Q. On account of the condition of the hook?

A. No, the hook was--

Q. On account of the condition of the hook and the scheme you had of putting that in there, isn't that true?

A. No, the condition of the hook was all right.

Q. The way you had to hook it in, the scheme of handling the thing? A. Yes, but the hook had been going on for years, we had the same hook for years."

The foreman further testified that the hammer was the only one of its kind in the country, and that immediately after the accident the master mechanic made an examination of it. There is no intimation of any examination or repair after its former falls.

It is because of the undisputed facts and the evidence for the defendant which we have recited that we say



that if we did not take into account these strict rules of pleading a plaintiff's case which are the law of Illinois, there could be in our minds no doubt of the liability of the defendant or the correctness of the judgment, even without the added force given to that conclusion, if the testimony of the plaintiff where he is contradicted is taken as true. He testified that on the morning of the accident -

"At nine o'clock in the morning after I hooked it, the hammer, the hammer go up and to fall down from four feet, and the next time at ten o'clock she fall down too, and I go to boss" (i.e. the foreman) "and say to boss, the hook is no good on that work, and the boss say what is the matter that it is not good, and he come in himself and say I show you that the hook is all right and he hooked it his self, that hook, and say to the motorman if he start up with the hammer, if the hammer go just three feet up, and the boss say to me put a knuckle and I picked it from the floor, that knuckle, and put it and he go down just four feet and the hammer fall on my hand. My fingers was under the knuckle at that time and the hammer fall in one second."

The jury had a right to believe the plaintiff's story concerning this complaint to the foreman of the previous action of the hammer, although it was contradicted by the foreman, and had a right to believe other statements of the plaintiff as against similar contradiction. Something is said in the arguments for defendant of inconsistency and confusion in the plaintiff's testimony; but it does not seem to us that it is not as clear and consistent as could be expected from one so little versed in English and encouraged by the Court to try to speak it rather than to trust to an interpreter. Nor does it seem to us in verisimilitude and inherent probability to suffer in comparison with some of the more fluent statements of the foreman who contradicts him.

It is indeed argued that apart from the question of the pleadings, which we have not yet touched, that as a matter of substantive law there is a defense to any action against the defendant Company, inasmuch as any negligence to which the accident can be attributed must have been the neg-



ligence of a fellow servant of the plaintiff, for which the defendant would not be liable. We do not assent to this in view of the undoubted authority residing in the foreman, Farabaugh, who was in charge of this department and the obedience and subordination which in the nature of things this inexperienced, freshly arrived youth from Russia was under towards him. It inhered in the verdict of the jury, (who were correctly instructed at the request of the defendant both generally and particularly on the law of this question) that they held that the accident was not the result of the negligence of a fellow servant, but of some superior or representative of the company. The jury were the judges of this issue and we do not disagree with their decision. Nor do we think the doctrine of assumption of risk has any place in the case.

holding, as we do, that the defendant directly or by its representative was negligent and that it can not successfully make a defense resting upon the doctrines of contributory negligence, fellow servants or assumption of risk, we nevertheless are obliged to consider this case a close one upon more technical grounds.

A vigorous and very able argument has been made by the counsel for defendant that whatever negligence may have been proved by the very happening of the accident, there is no evidence in the record tending to show that defendant was guilty of the particular negligence alleged in the two counts of the declaration.

The common law rules of pleading are the law of Illinois in this respect, and nothing is better settled than that the specific negligence charged in the declaration must in a case of this sort be proved to warrant a verdict for the plaintiff. The question whether in this case it was so proved

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by evidence which the jury were justified in their discretion as holding preponderant, is not without difficulty, and we have given it thorough consideration. We cannot perhaps better express the conclusion to which we have arrived than by quoting the fourth instruction given by the Court to the jury and stating our opinion that it correctly states the law and that the evidence warranted the jury by following the converse of the proposition, in finding the defendant liable.

The fourth instruction was this:

"The Court instructs you that the plaintiff can not recover under the third count of his declaration unless it appears by a preponderance of the evidence that a foreman employed by defendant ordered plaintiff to place a knuckle under the hammer, and that said foreman, when he gave the order, knew or could have known by the exercise of ordinary care that said hammer was insecurely and insufficiently fastened."

We have already sufficiently indicated, we think, why we think that the foreman by the exercise of ordinary care "could have known that said hammer was insecurely and insufficiently fastened", and we think, despite the strenuous argument to the contrary, that it was for the jury and is not for us to decide whether the plaintiff or Parabough gave the accurate and true statement concerning the alleged order by Parabough and the placing of the knuckle upon the anvil. We do not think either was particularly corroborated.

The final reason urged by the defendant for the reversal of the judgment is the refusal of the Court to adjourn for a day to allow the defendant's witness, Heywood, to arrive. We could only hold it to justify a reversal on the ground that it was an abuse of the discretion which every trial judge must have in such cases. We do not think it was so.

The possible delays on the ordinary routes of travel from East to West at that time were known to all; Heywood's affidavit in the record shows it. The Court had adjourned over April 1st. A greater margin of time might have

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been allowed for the journey of the witness. It was not unnatural that it was not, but the risk was the defendant's, we think, and there was no abuse of discretion in the refusal of the Court to disarrange his work by suspending for a whole working day the regular course of his calendar.

The judgment of the superior Court is affirmed.

APPEAL.



CHARLES A. NOWAK,  
Defendant in Error,

vs.

CLARENCE H. GEIST,  
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT  
OF COOK COUNTY.

1891.A.202

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

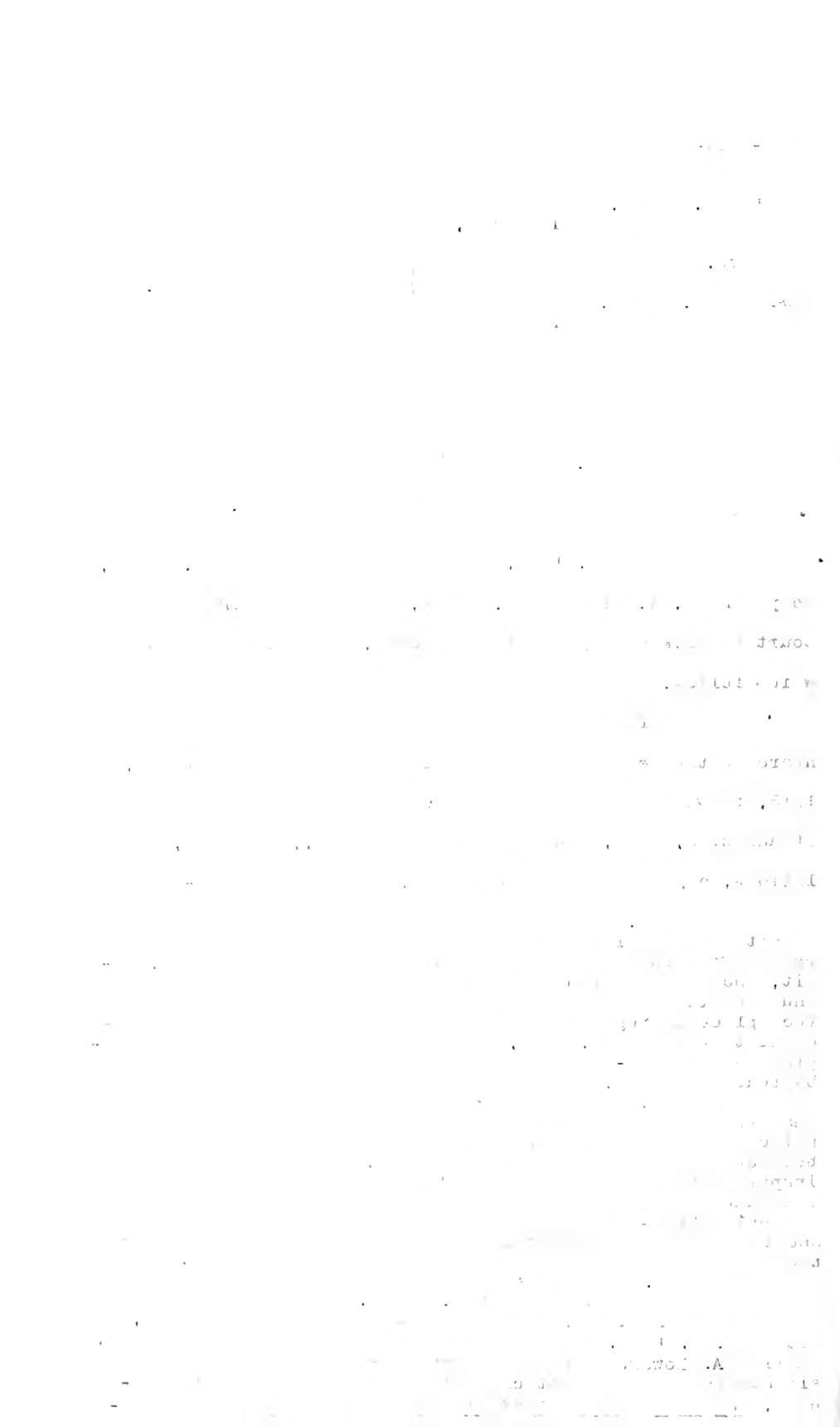
June 7, 1913, in the cause of Charles A. Nowak,  
complainant, v. Clarence H. Geist, a Chancellor in the Circuit  
Court of Cook County entered a decree, the material parts of  
which follow.

After reciting that the cause had come on to be  
heard on the Report of a Master in Chancery dated March 3,  
1913, to whom it had been referred under an order of the Court  
of August 3, 1911, and on certain testimony, exhibits, stipu-  
lations, objections and exceptions, the Court finds -

"1. That the Master by Paragraph 29 of his said  
Report specifically states that he comes into court with a  
request for further instructions on the specific point, to-  
wit, should the defendant be considered a trustee for the use  
and benefit of the complainant in all of the transactions that  
took place in regard to the Hammond Illuminating plant subse-  
quent to February 1, 1903, and be made to account to the com-  
plainant for one-half the profits that accrued to the defendant  
by reason thereof.

2. That inasmuch as the Court is of the opinion  
that the defendant is a trustee \* \* and that the Master has  
not completed the account necessary to be taken and stated  
between the complainant and defendant, it is unnecessary and  
inappropriate at this time for the Court specifically to pass  
upon the various objections and exceptions of the complainant  
and defendant to said report and rulings upon said objections  
and exceptions are reserved until the coming in of the com-  
pleted report of the Master to be filed in this cause.

3. That under all the evidence taken in this  
cause the defendant, Clarence H. Geist, was and became on the  
termination of the partnership between the parties hereto, to-  
witm Feb. 1, 1903, a Trustee de son tort for the complainant,  
Charles A. Nowak, of an undivided one-half interest in the  
six hundred squares of stock of the Hammond Illuminating Com-  
pany, and of the franchises or proceeds thereof in East Chi-



cago, Indiana Harbor and Whiting, - unless the Master finds that said franchises were paid for by the \$83790.66 paid by the Union Gas Company - and of all the accretions of whatsoever kind or character thereunto belonging or appertaining including \* \* \* and as such Trustee said defendant must account to the complainant in this cause for each and all of the aforesaid in kind \* \* \* or if he has disposed of the same then he must show what disposition he made thereof and what he received therefor \* \* \* including said franchises and the proceeds thereof."\* \* \* \*

The Court then decrees<sup>d</sup> that -

"Stillman B. Jamieson, Master in Chancery \* who now has the cause under consideration to take and state an account between the parties hereto, be instructed that on the taking and stating of said account he shall require said defendant to state his account showing what disposition he made of the franchises in Whiting, East Chicago and Indiana Harbor, together with the proceeds thereof and of the six hundred shares of stock of the Hammond Illuminating Company, together with all accretions", etc. \* \* \* \* \* "And said Master shall state said account on the basis of one-half of all the assets and profits therefrom acquired by the defendant and being held by him as Trustee belonging to the complainant, and that any and all loss, if any, sustained by the defendant subsequent to February 1st, 1903, in relation to said property or transactions shall be paid by and charged to him individually. \* \* \* \* \* Finally, the Master is instructed and directed to make his report touching the matters heretofore referred to him as explained and made more specific by these instructions and present the same, together with the evidence produced before him and his conclusions of law and fact thereon, to this Court with all convenient speed."

The defendant Geist immediately prayed an appeal from this decree to this Court, which the Chancellor on June 7, 1913, denied, - undoubtedly because he did not consider it a final decree.

Thereupon the defendant Geist on August 26, 1913, sued out a writ of error from this Court to the Circuit Court, and <sup>also</sup> a transcript of the record in the cause to the date of <sup>the</sup> ~~this~~ decree, <sup>which</sup> comprising almost a thousand pages of typewritten matter, is before us on this writ of error.

An application for a supersedeas was made to a Judge of <sup>the Appellate</sup> ~~this~~ Court in vacation and allowed on bond. Later the complainant - the defendant in error - appeared and on December 6, 1913, filed a motion to dismiss the writ of





error at plaintiff in error's costs, because -

"The decree or order in question is not a final decree, and

The statutes of this State provide for writs of error on final decrees or orders only, and not upon preliminary or interlocutory decrees or orders such as the present one, and

The hearing of the case was not completed in the trial Court, and this is an effort to have the Appellate Court hear by piecemeal the litigation between the parties hereto."

This motion was both vigorously pressed and opposed by counsel for the respective parties with written suggestions, in which the question was elaborately argued, although in an oral argument before us on the merits thereafter, the defendant in error expressed a desire for an adjudication on the merits of the cause as far as it had gone. This he desired because the decision on his motion to dismiss had been so long delayed.

In the press and congestion of business in this Court when the motion was made and in consideration of the extended suggestions filed, it was thought by the Court, as it had been by the writer when he with hesitation ordered the supersedeas in vacation, that the decision whether this decree was so far final as to warrant this writ of error would best await the hearing of the cause in its order. The motion therefore was reserved to the hearing - a disposition which we now regret in view of the conclusion to which we have been forced. It has resulted in expense and loss of time to the parties which we deplore. For, notwithstanding a strong inclination to settle for the parties questions which in the nature of things it would be convenient and desirable to now settle, we feel ourselves under the law of Illinois without power to do so.

We have decided that the position taken on the motion to dismiss by the defendant in error was well taken

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and that to entertain this writ of error now would be to hear the case piecemeal - a course unauthorized by the statutes giving us jurisdiction and expressly reprobated by our Supreme Court.

The record apparently indicates a difference of opinion, to be regretted, between the two Chancellors below who have been concerned with the cause, as to what date the accounting on the alleged partnership which is the subject of the litigation should extend. But no conclusion has been reached,--so we are convinced after an extended and conscientious examination of the record, and of the authorities which are on each side cited in relation to this motion to dismiss--which can be considered final and reviewable by us. An elaborated discussion of the considerations which, taking in view all the pleadings and proceedings in the case, have forced us reluctantly to this conclusion, would be of no service to either party; nor would a citation of authorities.

We do not by any means place our decision solely or indeed principally on the presence of the words in the decree to which we have called attention by italicizing them; but we suggest that even in the absence of other controlling considerations their presence alone would negative the existence of that condition in this case which the Branch Appellate Court found in *Rice v. Dougherty*, 148 Ill. App., the opinion of Mr. Justice Chytraus in which, counsel for the plaintiff in error has quoted at length in his argument against the dismissal of this writ. That case the Court found came under the undoubted rule that "when a decree determines and definitely settles the rights of the contending parties relatively with reference to the subject matter of the controversy, then the decree is final."



In the interlocutory order or decree (as we must deem it) of June 4, 1913, Judge Hangan does pass on one important question in this litigation, and apparently, as it seems to us, differently from the way in which Judge Petit passed on it, by implication at least, in his order of August 3, 1911; but he does not "determine and definitely settle the rights of the contending parties relatively with reference to the subject matter of the controversy."

It would be in many respects convenient if we could now review the one important point which Judge Hangan's order did adjudicate, and hereafter, as occasion arises, review final orders about other undetermined matters in the cause; but we have no power under the law of this State to do so.

The writ of error must be dismissed, which of course quashes the supersedeas order, that being merely, that the writ of error shall operate as a supersedeas.

WRIT OF ERROR DISMISSED.

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W. S. ADAMS,  
Appellee,

vs.

WILLIAM D. KERFOOT  
and GEORGE BIRKHOFF, Jr.,  
trading as W. D. KERFOOT & CO.,  
Appellants.

JUDICIAL CIRCUIT COURT  
OF COOK COUNTY.

189 I.A. 211

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court of Cook County for \$181.60 entered March 5, 1913, in favor of W. S. Adams, the plaintiff below and appellee here, and against William D. Kerfoot and George Birkhoff, Jr., (constituting the firm of W. D. Kerfoot & Co.) defendants below and appellants here. It was rendered on the verdict of a jury in an action of assumpsit. The declaration contained merely the common counts, but a bill of particulars described the claim as follows:

"Plaintiff's claim is for money due him as a real estate broker from the defendants under and by virtue of a contract whereby it was agreed between them that if the property at the southeast corner of Fulton and Ada streets in the City of Chicago, County of Cook and State of Illinois was sold or rented directly or indirectly to J. S. Heaney, William B. Heaney, the Heaney Galvanizing Company or any of them, or to any one whom they might suggest, that they would pay to the plaintiff the sum of \$400 as commission for being the procuring cause of said sale, and plaintiff avers that said sale was made in accordance with said undertaking and agreement."

We are of opinion, after a study of the record in this case that the evidence shows that the plaintiff has no valid claim against the defendants, and that the jury should have been peremptorily instructed for the defendants at the close of the plaintiff's case. The facts plainly appear to be these:

W. D. Kerfoot & Co. had in their charge as real





estate agents a lot at Ada and Fulton streets, Chicago. W. C. Adams called on them and offered \$14,000 for it. Kerfoot & Co. communicated with the owners and then declined the offer. Then after some further negotiations in which Kerfoot & Co. said they had authority to sell for \$15,000 net to the owners, who would out of that, however, pay neither commissions nor for abstract nor other expenses. There is some diversity in the versions of the conversations occurring between the appellee and the appellants, but nothing that essentially contradicts Mr. Birkhoff's testimony that these were as favorable terms as the owners would make and that they were communicated to Mr. Adams. Kerfoot & Co. said they wanted \$400 commission at least, and their statements to Adams were in effect that he could get a commission from the sellers only if the property was sold by him for over \$15,400. If Adams could get \$15,800 for the property from the purchaser he had in mind he was to receive \$400 of it. Kerfoot & Co. inquired of Adams the name of the possible customer and Adams disclosed it, Mr. Birkhoff for the appellants saying, that is all right, "I want to know so that we can protect ourselves."

Mr. Adams did not offer the property to Heaney at \$15,800, but as Heaney had been in his negotiations with Adams desirous of "trading in" some property of his on Carpenter street, first at a valuation of \$15,000, which he afterward reduced to \$14,000 and then to \$13,000, Adams drew a contract by which Heaney (with his brother) was to undertake to purchase from Harriet E. Marsh, an employee of Adams, the Ada street property at the price of \$18,000 and pay for it \$5,000 in cash and the Carpenter street property at \$13,000. This negotiation was not communicated to Kerfoot & Co., nor had Harriet E. Marsh any title of any kind to the Ada street property.

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Heaney did not execute this contract but carried it to his lawyer. He then first ascertained that Harriet E. Marsh was an employee of Adams, and apparently believing he could make better terms for the Ada street property without the intervention of Adams, he went to another real estate man, one Harper, and instructed him to go to Kerfoot & Co. and ascertain what he could buy the property for. Harper returned to him and said he could buy it for \$15,400 cash. Heaney immediately instructed Harper to consummate the purchase and gave him \$500 in currency for the purpose of making an immediate payment on account. Heaney directed Harper to have a contract of purchase and sale drawn, to be signed by Kerfoot & Co. for the owners (the Lovejoy heirs) and to run to one Margaret Aylward, who was his niece. This relationship was not known to Kerfoot & Co. Heaney told Harper to conduct the business of making the purchase without letting Kerfoot & Co. know that he, Heaney, was buying the property.

Mr. Harper got the draft of a contract from Kerfoot & Co. running to Margaret Aylward, and was told by Kerfoot & Co. that they, Kerfoot & Co., must get \$15,400, and that Harper could get no commission from them if the property was sold for that price. Harper carried the contract to Heaney, who signed Margaret Aylward's name to it. Harper then carried it back to Kerfoot & Co., and then was asked by Mr. Birkhoff whether Heaney had anything to do with the purchase. Harper, contrary to the fact, assured him positively that he had not, but that the purchaser was a new party, whereupon Birkhoff signed the contract for the Lovejoy heirs. The sale was afterward carried through by the execution and delivery of deeds from the Lovejoy heirs to Heaney, and the payment of the balance of the cash making up the \$15,400, of which the owners received \$15,000. The abstract expenses, etc., were

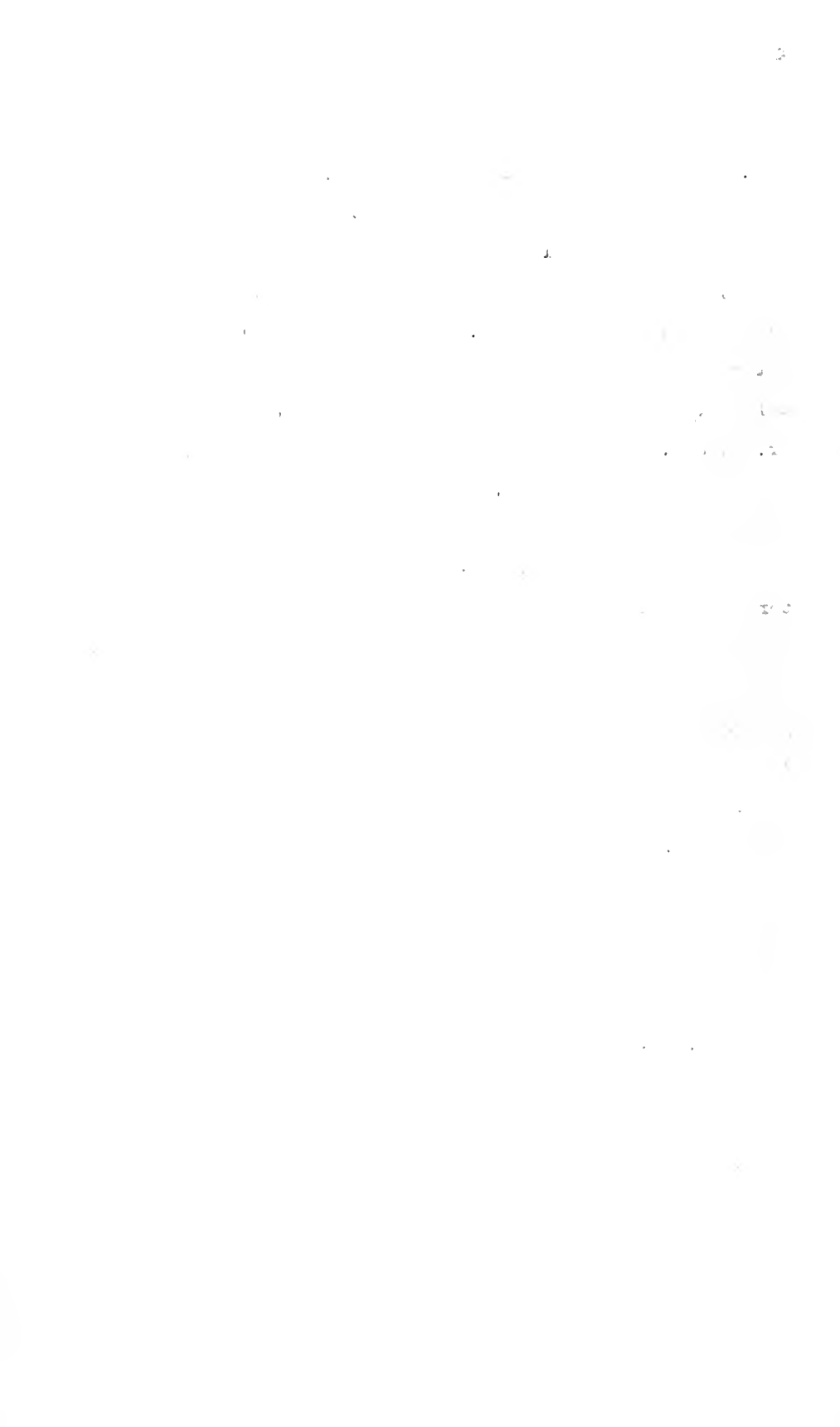


\$36.80 and Kerfoot & Co. retained \$363.20.

After the contract was signed and the \$500 paid, there was a telephonic conversation between Mr. Birkhoff and Adams, the date and exact nature of which Mr. Adams and Mr. Birkhoff differ about. Mr. Adams thinks it was some days after the contract with Margaret Aylward was signed that he told Mr. Birkhoff over the telephone that the purchaser was Mr. Heaney, buying the property under another name, and that he expected a commission, to which Mr. Birkhoff replied that it was not Heaney but another party entirely to whom the property had been sold. Mr. Birkhoff's version of this matter implies that as there had been these prior negotiations, he called up Adams on the same day the contract was signed, but after it was signed, and told him that they had sold the property. Adams asked "Is that so?" and Birkhoff answered, "Yes; I am very sorry, Mr. Adams, but we have sold the property." Birkhoff says this was the last conversation he had with Adams.

We think it is immaterial which of these versions is correct. We do not think the evidence anywhere discloses any employment of Adams by Kerfoot & Co. to sell this land for anything that would net Kerfoot & Co. less than \$15,400. We think it does disclose a refusal to do so and a refusal to sell for less than that sum net to them. We do not find anything in the evidence which shows that Kerfoot & Co. had any reason even to suspect until after the sale was made that anybody with whom Adams had been in communication was concerned in it. They acted in entire good faith and protected themselves against any imputation of the contrary. They cannot be held liable because some one lied to them.

We do not think that the evidence shows that



Adams represented the appellants at all. He did not submit their price and terms to Heaney, but endeavored to arrange for himself a triangular and profitable deal. If he were not in the employ of the appellants they could not complain of this, but it did not give him a claim against them. If he was in the employ of Heaney, Heaney had ground of complaint. If he was in the employ neither of Perfect & Co. nor of Heaney, he has no ground of complaint against either because his own scheme to make a profitable deal miscarried. It was simply in that case his misfortune.

The judgment of the County Court of Cook County is reversed.

REVEREND.





The appellants never employed the appellee to sell the property for the sale of which he claims a commission or brokerage fee, and never knowingly took advantage of the willingness of a person interested by the appellee to purchase the property, but sold the same in good faith to one whom they supposed had no connection with the appellee or any person interested by appellee in the property. The appellants had no agreement with appellee to pay any brokerage fee or commission on said sale.



LEVI G. BETZEL

vs.

GEORGE E. FADNER.

In the Matter of the Appeal  
of EDWIN C. DAY, JOHN C.  
WELLS, LEWIS W. FADNER  
and HENRY M. HAGAN,

Petitioners,  
Appellants,

vs.

GEORGE E. FADNER,

Respondent,  
Appellee.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

191 A. 222

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This cause comes to us on a praecipe transcript  
of record containing only -

"1. A suggestion of damages filed in the cause of  
Levi H. G. Betzel vs. George E. Fadner,

2. A Decretal order entered in said cause on  
April 19, 1913,

3. An Appeal Bond filed in said cause on May  
19, 1913.

4. Register entries in said cause on and after  
April 19, 1913.

5. The praecipe for the transcript.

The suggestion of damages is by the defendant  
Fadner by his solicitor. He says in it that he has sustained  
damages in the sum of \$25000, by the wrongful suing out of an  
injunction by the petitioners, above named;

First, by being compelled and having become liable  
to pay his solicitor and counsel \$1800 for his reasonable fees



in procuring a dissolution of an injunction in the cause mentioned of Hetzel v. Fadner.

Second, by being compelled and liable to pay his attorney \$250 charges for services in preparing for a trial of a suit at law, the prosecution of which was enjoined by said writ of injunction.

Third, by being compelled to pay a court reporter for the preparation of certain documents relating to the issuance of the injunction, \$46.20.

Fourth, by being compelled to pay printing bills for printing abstracts and briefs in the matter of the appeal to the Appellate Court from the order granting the injunction, \$100.

Fifth, by being compelled to pay certain witnesses for attendance at the trial of the suit at law, which was restrained, \$25.

The decretal order, reciting that the cause came on to be heard on the suggestion of damages filed by Fadner against said petitioners and the answers of said petitioners to said suggestion, and reciting also that the Court has heard and considered the evidence adduced by respective parties and the arguments of counsel for the respective parties, and is fully advised, ~~finds~~ <sup>finds</sup> -

"That the defendant respondent, George M. Fadner, has sustained damages in the sum of five hundred dollars in and about the procuring of the dissolution of the injunction issued herein on or about the 17th day of January, 1911, upon the petition of the said Edwin C. Day, John C. McKernson, Lewis W. Parker and Henry M. Hagan, restraining the said defendant respondent George M. Fadner from the prosecution of a certain suit in the Superior Court of Cook County, Illinois, against the said petitioners \* \* \* said injunction having been dissolved by the Appellate Court", etc.

And then orders and decrees that Fadner recover \$500 from the petitioners and have execution therefor.



The "petitioners" Day, Lecherson, Parker and Hogan have appealed from this order to this Court.

The only other matter shown by the transcript (except the appeal bond and praecipe) is a certificate of the Clerk of the Circuit Court that the following is "a true, perfect and complete copy of the Clerk's Chancery Register on and after the 19th day of April, A. D. 1913."

"Metzel  
v. 249475  
Padner.

|                           |                                    |                 |
|---------------------------|------------------------------------|-----------------|
|                           | Copy of Clerk's Chancery Register. |                 |
| Notice.                   | Geo. W. Wilbrie                    | April 19, 1913. |
| Suggestion of Demurr Copy | Do.                                | July 19, 1913." |

What this may mean we do not assume to know.

But the appellee has not favored us with an argument in this case, and an examination of the transcript as it is brought here by the appellants, which in the absence of any suggestion to the contrary by the appellee we must assume to contain all that is material in the appeal (as is positively asserted by the appellants) shows that there are neither recitals of findings in the decree sufficient to sustain the ordering part, nor is there any evidence to support the decree preserved in the record. (perhaps this is what the copy of the Chancery Register is supposed explicitly to show.) Under these circumstances the decree or decretal order falls under the doctrine announced in an almost identical case decided by this Court. -

Howard v. Austin, 12 Ill. App., 155;

Krensz v. Rugebein, 6 Ill. App., 43; and

Rosenfeld et al. v. DeWitt et al., 86 Ill.

App., 557;

and never departed from.

The decree must be reversed and the cause remanded.  
REVERSED AND REMANDED.

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523 - 19928

CHICAGO CITY BANK AND TRUST  
COMPANY and LOUIS RATHJE, Trustees,  
Appellees,

vs.

JACOB BREMER,

Appellant.

APPEAL FROM THE  
COURT OF COOK COUNTY.

139 I.A. 208

RECEIVED BY THE CLERK OF THE COURT

DELIVERED THE CLERK OF THE COURT.

This appeal is from a decree in chancery of the Superior Court, entered July 8, 1913, foreclosing at the suit of the Chicago City Bank and Trust Company (which it finds to be the legal owner and holder of a certain note for \$3500 in said decree described) and of one Louis Rathje (the Trustee named in the trust deed mortgage purporting to secure said note) the said trust deed mortgage. The decree in the usual form of such decrees, after approving and confirming the report of a Master to whom the cause had been referred, finds the making of the \$3500 note with certain interest coupons by one Anna B. E. Bremer and Jacob Bremer, her husband, and the execution and delivery by said Bremers of a trust deed mortgage of Lots 25, 26, 27 and 28 in Block 12 of Ironworkers Addition to South Chicago, etc., to secure the said notes.

The provisions of the trust deed, which are those usually found in such instruments as they are used in this vicinity, are recited in the decree. There are then findings in the decree that all the interest notes made and delivered at the time of the execution and delivery of the principal note have been duly paid by and surrendered to the makers thereof, but that the principal note became due July 20, 1914, and re-



mains wholly unpaid, and that there is due on it to the Chicago City Bank and Trust Company \$3500 principal and \$615.11 interest (up to the date of the Master's Report), and, under the provisions of the trust deed, \$24.50 for an amount paid by the Bank for a continuation of the abstract of title for the purposes of the foreclosure, and \$200 which it is entitled to recover as its solicitor's fee, making, besides the costs of the proceeding, \$4239.61 due to it.

The decree then declares that the Chicago City Bank and Trust Company has therefore a lien for \$4239.61 on the premises described in the trust deed, and orders that "unless the defendants Jacob Bremer, Helen Bremer, his wife, and Fred C. Glen, or one or some of them, within one day from the date of entry of the decree, pay or cause to be paid to the complainant, the Chicago City Bank and Trust Company, or to the officers of the Court the sum of \$4239.61 with interest thereon at the rate of 5 per cent. per annum from the date of the Master's Report to the day of such payment, together with the costs incurred by the complainant in the prosecution of the suit and the Master's fee therein, which is taxed at \$61.11, the said premises, or as much as may be necessary, etc., be sold "to the highest and best bidder for cash", under the certain usual conditions, terms and results set forth in the decree, and that "upon the expiration of fifteen months after the date of such sale if the premises so sold shall not be redeemed according to law, the defendants and all persons claiming under them, or any of them, since the commencement of this suit, shall be forever barred and foreclosed of and from all right and equity of redemption or claim in and to said premises or any part thereof."



*appealant charged a. Jerome for interest,*

The reasons urged by the appellant, Jacob C.

Bremer, for the reversal of this decree are that there is a defect of parties in the cause in which it was rendered; that the cause should not have been referred to a Master in Chancery; that the Master's acts and report were unauthorized and unjustified in law; that the fees charged by him and allowed were illegal; that his report should not have been confirmed; that the trust deed foreclosed was not connected with the notes described in the decree which the Court found it was given to secure; and that the contract as a part of which the trust deed was executed and delivered was void as and the amount found due by the Court was therefore under the law not due.

We shall take up these points in order. The decree is assailed in the order in which we have mentioned them.

The notes involved a principal note for \$3500 dated July 20, 1906, and payable five years after date to the order of the makers, and ten interest notes (hereinafter also more particularly described), each for the sum of \$105, due at intervals of six months during the five years, all signed and endorsed in blank by Anna B. F. Bremer and Jacob Bremer. The trust deed in question, of the same date, was signed and acknowledged by the same persons and ran to Louis Rathje in trust to secure certain described notes, with the usual provisions of such trust deeds that the legal holder of said notes might foreclose the said deed of trust in case of default in the manner provided by law. The evidence taken in the cause <sup>shows</sup> that under date of April 18, 1908, Anna B. F. Bremer (in her own right; and Jacob Bremer (her husband) executed a warranty deed of the land in question to Jacob Bremer, reciting it to be "for and in consideration of the love and affection I have for Jacob

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Bremer, my husband, and other good, valued (sic) and sufficient consideration, and the further sum of one dollar in hand paid"; that said deed was acknowledged by both parties on April 18th and recorded on April 20th, 1908, and that on April 19, 1908, Anna B. F. Bremer died intestate, leaving her surviving Jacob Bremer, her husband, and Katherine Jack and Julia F. Barker, her sisters, her only heirs at law and next of kin.

The bill in chancery on which this decree of foreclosure was entered was filed July 26, 1912, and made as parties defendant Jacob Bremer, Helen Bremer (the present wife of Jacob Bremer), Fred C. Oien and David Lingree. It contained an allegation that the grantors in the trust deed had conveyed their equity of redemption to Jacob Bremer and that he was in possession of said premises, and that Helen Bremer, Fred C. Oien (a holder of a certificate of sale under the foreclosure of a subsequently recorded encumbrance), and David Lingree, had or claimed to have some interest in said premises as judgment creditors or otherwise, "which interest, if any, accrued subsequent to the lien of said trust deed and are subject thereto". Assuming that the trust deed secures the notes described in the decree (as we hold it does), we see no defect of parties to the bill under these facts. The contention of the appellant, Jacob Bremer, is that the heirs or representatives of Anna B. F. Bremer should have been made parties. We do not think so. It certainly does not lie in the mouth of the appellant to say so. He signed the notes and received the money, besides signing the trust deed. He took the warranty deed from Anna B. F. Bremer, recorded it and took or kept possession of the property. He testified on direct examination: "That land was her" (i. e. Anna B. F. Bremer's) "sole and separate property up to the day before her death - on the

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day before her death she executed the deed, the record of which has been offered in evidence. Up to the day before her death I had a right of dower and homestead in those lands, and she the fee"; and on cross-examination - "Up to the day before her death, which was April 18, 1906, she was sole owner of the property here in question, and on that date she executed the deed jointly with me conveying the premises to me - a warranty deed."

If the heirs or representatives of Anna B. . . Bremer had any interest in these proceedings by ignoring which Jacob Bremer would be in any way injured, this is practically inconceivable by us, he might have brought them in by cross-bill. The defendant further, however, raises the point that two defendants, Helen Bremer and Fred O. Oien, were personally served with summons, but were not defaulted before reference to the Master or until the decree (which takes the bill as confessed against them), and that the other defendant, David Pingree, was not served and never appeared.

The contention of the defendant concerning this is that the proceedings before the Master were invalidated by it. We do not assent to this. The three parties named were made defendants under a general allegation of a supposed but inferior interest. Pingree was not served and never was a real party to the litigation. The decree does not run against him and, like any one else in the world who might have an interest and who was not made a party, he is not affected nor foreclosed by it. It would have been more regular to default Helen Bremer and Oien before reference; but the bill was finally taken pro confesso against them and they have made no appearance to the bill nor are they here complaining. It is only they who in any event could do so. The irregularity does not injure the



appellant either in respect to the Master's rulings or costs or to any other point, and it is evident that to do so would be to consider it injures them.

*Michael v. Kace*, 137 Ill., 420 p. 494;

*Lyle v. Lyle*, 158 Ill., 289.

The contention that the cause should not have been referred to a Master in Chancery "to take proofs therein and to report the same, together with his findings thereon to the Court", and that the "reference is void", is based, as we understand the argument, on the position that a Master in Chancery is a ministerial officer merely, when the sixth section of the Act concerning Masters in Chancery, which says they shall have authority "to perform all duties which according to the laws of this State and the practice of the Courts of Chancery appertain to the office", and the thirty-ninth section of the Chancery Act, which says that "the Court may upon default or issue joined refer the cause to a Master in chancery \* \* \* to take and report evidence with or without his conclusions thereupon", cannot make a judicial one.

We see nothing erroneous in the reference, certainly nothing of which this appellant can complain. Nor do we see anything illegal or unconstitutional in the usual practice followed in this case, of referring the cause to a Master to take evidence and report conclusions. The Chancellor was not bound to follow the conclusions of the Master. The report was for his assistance. Objections were filed to it before the Master and were overruled by him and were afterwards allowed to stand as the exceptions of the appellant before the Court. The procedure seems to us justified and regular.

But it is maintained that the "findings" which the order of reference instructed the Master to report were



only the "ultimate facts" and that he went beyond this - "gave advice" to the Court, and is entitled, therefore, to no fees. We see no merit in this contention, nor in the allied ones, which we shall not particularize, relating to the various amounts which made up the allowance to the Master of \$51, which the Court made, and the \$240 of solicitor's fees and \$24.50 abstract charge, in favor of the addition of which to the amount found otherwise due the complainant the Master reported. The appellant complains that the Master did not report the documentary evidence. We do not find the complaint well founded. The report filed May 5, 1913, expressly recites that the testimony taken with the exhibits is returned and made a part of the report. It was not until the decree was entered July 8, 1913, that the complainant's exhibits were withdrawn from the court, as appears by an order of court entered on that day, when, as it appeared, a certificate of evidence containing copies of them, together with the defendant's original exhibits, was signed and filed, which certificate is before us by stipulation. If it was not in the original transcript of the record, that is not the fault of the Master.

The contention that the trust deed foreclosed was not connected with the notes described in the decree, which the Court found it was given to secure, has been elaborately argued before us by the appellant's counsel, but can be briefly disposed of.

The question of the identity of the notes produced by the complainant in evidence with those described in the trust deed, was one of fact. Despite the variance between the recital of the trust deed as to the place of payment of the notes and the actual fact as shown by the notes, and despite the entirely immaterial fact as it seems to us, that the accelerating clause



in the principal note which, at the option of the holder, made it due at once if there was default in the interest payments, was not repeated in the recitals of the trust deed, the master and the court found that the notes produced were those described in the trust deed.

It would have been contrary not only to the greater weight of, but also to the entire, evidence if they had not.

Perhaps the most emphasis is laid by the appellant upon his position that the loan or contract which was the occasion of the trust deed was fraudulent and that no such sum as the decree finds due is therefore under the laws of this State due to the complainant. We have given the argument of the appellant on this point careful attention, but we think it is fallacious. The only stated basis for it which it is necessary to discuss is the fact that interest notes aggregating \$1200 were given with the principal note, which interest notes, appellant maintains, must be considered separate and independent obligations given in addition to the principal note for the money which was paid to Jacob Bremer, and that by the "accelerating" clause in the principal note that note was contingently payable in less than six months from its date.

The argument fails in its main point, for the interest notes in question were not additional, separate and independent obligations in the sense which would make the theory important. They could not be so held or treated in the hands of any person not an innocent holder for value without notice; and their terms are such that there could be, in our opinion, no holder conceivable who could be held to be innocent of knowledge that they were interest notes and not put, therefore, on inquiry as to whether the principal note, which was





carefully and in detail described in them, was still outstanding or had been paid.

But further, the accelerating clause in the principal note, although more usually placed in the trust agreement or trust conveyance which secured the notes in real estate loans of this kind, is a common one in such loans. We do not think its presence can be used "to lard", as the appellee expresses it, the amount of the interest notes, the commissions, and the other items of money paid by the borrower to the lender, on to the first interest period of the principal note. Without such an effect given to this "contingently accelerated" clause, there is nothing to suggest usury in the transactions, nor anything which the courts of this State have not held allowable and legitimate. Appellant admits, accepting it, however, to be immaterial, that there was no more than legal interest paid, - that no acceleration took place, and that all the interest notes were paid and given up and cancelled, and that the principal note never became due until July 20, 1911.

The decree of the Superior Court of Cook County is affirmed.

ATTEST.



LOUIS ROHMER,  
Appellee,  
vs.  
AXEL W. ANDERSON,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

189 I.A. 274

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$2000 entered by the Superior Court of Cook County on April 12, 1913, against the defendant below and appellant here, Axel W. Anderson, in favor of Louis Rohmer, plaintiff below and appellee here. The judgment was entered on the verdict of a jury in a personal injury case.

The grounds on which we are asked to reverse the judgment are -

First: That the declaration does not state a cause of action, and therefore the judgment should have been arrested;

Second: That the verdict is against the weight of the evidence, inasmuch as it is not shown that the fall of the frozen sand which broke the plaintiff's leg - the injury involved in the suit - was caused by the act, negligent or otherwise, of the appellant;

Third: That the verdict is against the weight of the evidence because the weight of the evidence shows contributory negligence at least on the part of the appellee.

Fourth: That the Court erred in consideration of the evidence in the case in instructing the jury as follows:

*Giving an instruction to the jury*



"The Court instructs the jury that a person who is suffering from an injury is only required to use reasonable diligence to employ a physician of ordinary skill and experience to treat him, and that the law regards the injury, if any, resulting from the mistakes of a physician, if there are any such mistakes, or from the failure of the means employed to effect a cure, as a part of the immediate and direct damages flowing from the original injury."

Fifth: That the verdict and judgment were excessive for the injury suffered.

For these various reasons it is maintained by the appellant there was error in not instructing the jury peremptorily for defendant, error in not granting a new trial and error in not arresting judgment, and that for the same reasons we should now reverse the judgment of the Superior Court and enter judgment here for the appellant.

We do not, after an examination of the record, find ourselves in accord with the various positions taken by the appellant and see no sufficient ground for disturbing the judgment.

The first count of the declaration alleges that the plaintiff on a certain day mentioned was working at a certain place mentioned beside a perpendicular bank of sand, the top of which was a frozen crust, and was in the exercise of due care and without knowledge of the danger to which he was exposed, and that the defendant was also working by said bank and "knowingly, intentionally, carelessly, negligently and unlawfully" caused a large quantity of the frozen top to break off and slide down, although he well knew the plaintiff's position and that he was in a place of danger and likely to be struck by the same, and that the plaintiff was struck and injured by the same.

We think this count of the declaration stated a cause of action.

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certainly owes to another engaged in the same work and exercising due care for his own safety the duty of exercising care to do his work in such a way as not to negligently injure the other."

Flanigan v. Wells Bros. Company, 237 Ill.88.

The second count charges the same things without stigmatizing the action of the <sup>defendant</sup> appellant in causing the crust to fall, by adverbs, but adding that although he caused the crust to fall, he "carelessly, negligently and unlawfully failed to notify or warn the plaintiff that the said bank was going to cave or slide off, although well knowing the plaintiff's position and that he was in a place of danger and likely to be struck by the same."

The criticism of this count is that there is no charge that it was the duty of appellant to warn appellee. The facts are stated and the duty is an inference. We think one of the counts must be good. If the appellant, knowing that the appellee was in a place of danger and likely to be struck by the falling crust, if it fell, either negligently caused it to fall, or necessarily and properly caused it to fall without warning the appellee, who did not know of the danger and was hurt, he is prima facie liable in our opinion.

The next two reasons put forward as ground for our setting aside the verdict of the jury relate to the weight of the evidence. Both the questions of the defendant's negligence and of the plaintiff's contributory negligence were primarily for the jury, and while the Court below, (on the motion for a new trial) and this Court, have the duty of weighing the evidence, the verdict must be clearly inconsistent with the preponderance of it to justify interference. On the evidence this case was a close one, but examination of it without the advantage, as the appellee suggests, of the "indications and demonstrations" of the witnesses causes us to think that





the jury might justifiably believe from it that the plaintiff was in the exercise of due care and justifiably ignorant that the work on the other side of the bank by another contractor's men had been going on in the particular manner it had, that the defendant's method of carrying on the work on his side of the bank was not a safe or careful one; that it might have been made so; that he had reason to think it was dangerous to men on both sides and particularly to those on the eastern side, where the overhang and the condition on the western side were unknown, and that he did not warn the plaintiff or the plaintiff's fellow workmen, and that the work on the western side caused the fall and the injury under those conditions. If the jury believed in this combination of circumstances they were right in their verdict. We do not feel that we ought to disturb it on the facts.

The instruction complained of is not erroneous. The tendency of the cross-examination of Dr. McGregor justified it, on the ground that it had been suggested before the jury that the treatment of the leg must have been unskilful or mistaken. It states the law.

Chicago City Railway Co. v. Saxby, 213

Ill. 274.

We do not think that to render the instruction proper it was necessary to show that a doctor who had been practicing twenty-six years had especial experience in setting broken legs. Nor do we think the judgment excessive for the injury sustained and the results proven.

The judgment of the Superior Court is affirmed.

AFFIRMED.



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CHARLES FREEMAN,

Appellee,

vs.

NEW ILLINOIS ATHLETIC CLUB,

Appellant.

APPEAL FROM THE CIRCUIT COURT  
OF COOK COUNTY.

189 I.A. 276

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of the Circuit Court of Cook County in favor of one Charles Freeman, who was plaintiff below and is appellee here, against the New Illinois Athletic Club, which was defendant below and is appellant here. The judgment, which is for \$3,000, was rendered on the verdict of a jury in a personal injury case, brought by the plaintiff, for an accident which is thus described in one of the counts of his declaration, purely formal parts being omitted and replaced by asterisks:

"The plaintiff \* September 13, 1911, \* \* was in the employment of the defendant in a certain building at \* Chicago \* and in pursuance of his said employment was \* engaged in painting certain parts of the interior of said building and \* \* the defendant by \* a certain other servant \* who was \* plaintiff's foreman and on behalf of the defendant in charge and control of the plaintiff in plaintiff's certain employment ordered and directed the plaintiff to \* \* paint a certain portion of the inside of said building which \* was \* high above the floor; that as the defendant then and there well knew, the floor there under said \* portion of the inside of said building was hard and slippery so that \* \* it was dangerous for a person to ascend a ladder to a point necessary to reach said \* portion \* and there stand on said ladder and paint, in that \* said ladder was liable while a person was \* standing on the same to print to slip and fall;

Notwithstanding the defendant negligently and carelessly ordered \* \* the plaintiff in discharge of plaintiff's duties as defendant's employe \* to ascend a \* ladder to said last mentioned point \* \* and at that point to stand upon said \* \* ladder and paint. \* The plaintiff \* protested to defendant and stated to defendant that the defendant should \* for the purpose aforesaid provide scaffolding, but \* the defendant by and through said \* foreman \* stated and promised to the plaintiff that if the plaintiff would ascend the \* ladder and \* there stand and paint,

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the defendant by and through said foreman would stand by and exercise reasonable care to do and be ready to do everything necessary to prevent or stop said ladder from slipping and throwing the plaintiff to the floor \* and in pursuance of said \* order and in reliance on said \* promise, the plaintiff in pursuance of plaintiff's said employment and without any negligence on the part of the plaintiff which proximately contributed to the happening hereinafter complained of, ascended said \* ladder to said \* point and at that point stood on said \* ladder to paint, but the defendant \* \* while the plaintiff \* was \* standing on said ladder painting, negligently and carelessly failed and omitted to stand by and exercise reasonable care to do and be ready to do everything necessary to prevent or stop said \* ladder from \* slipping and throwing the plaintiff to the floor \* and \* failed and omitted to exercise reasonable care to prevent or stop said ladder \* from then and there slipping and throwing the plaintiff to the floor, and \* by means of the premises \* \* \* \* the foot of said \* ladder slipped on the floor and \* said ladder fell and \* the plaintiff was \* thrown to the floor \* \* \* ."

We think the evidence strongly tended to prove these material allegations of the declaration.

There is a long record in the cause and it has been very elaborately and ably argued by both sides of the controversy, but the facts are few and simple.

The plaintiff was 32 years old and had been for many years a painter and decorator. He had been working at his trade under the employment of the defendant painting and decorating the club house for about two months previous to the accident. For most of that time John Jennings had been foreman of the painters, so introduced to the appellee by the general manager of the Club.

The appellee's statement of the case seems to us, on an examination of the record, to contain nothing that the jury, in the light of their verdict, cannot be considered to have justifiably believed, although it is in conflict in important particulars with some of Jennings' testimony introduced by the defendant. We shall therefore substantially adopt it herein in reciting the facts.

The day before the accident Freeman and other

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painters were working under Jennings in the swimming pool in the basement of the Club House.

During the forenoon of September 13, 1911, Freeman and another painter were directed to go to the gymnasium on the top floor of the Club House. There Jennings ordered the two men to clean the north and east walls of the gymnasium if possible and if they couldn't be cleaned to wash and calcimine them. The gymnasium is 200 feet long and 40 feet wide. It is thirty feet high at the east wall and of that height for ten feet west. From that point west it is 20 feet high.

Freeman asked Jennings for a scaffold with which to do the work. Jennings went down stairs to see the Manager and brought back an eighteen foot ladder. It was an old ladder, one-half of one of the legs being broken off for about four and a half inches. Freeman asked Jennings if he could not get a better ladder and Jennings said there was no other ladder. He further said, "You know they took the scaffold away - there is two scaffolds taken away from the Club by the Company. The Manager claimed he could not afford to hold the scaffold any longer. We must finish the work with the kind of tools we have got." Freeman told Jennings that if he (Jennings) would hold the ladder it would be possible to do some cleaning, although not possible to do any ceiling work. Jennings held the ladder and Freeman went up on it. Jennings held the ladder while Freeman was standing on it and working on the north side wall for an hour and a half before noon. There was a hardwood floor in the gymnasium washed with soap every morning.

At noon Freeman and his companion Bosong went to luncheon and returned to their work at 12:30. When they came back they found six men playing hand ball where they had been

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working. These men told them, "You can't finish the north side wall, you go on the east side." Jennings then took them over to the east wall and attached a twelve foot ladder to the top of the eighteen foot ladder and said to plaintiff, "Charley, you go and see what you can do; I will hold the ladder for you." The plaintiff replied, "If you hold it, you have to hold it with both hands or call somebody, because the floor is awfully slippery." The plaintiff remarked that it would be possible to nail a board on the floor to hold the ladder. Jennings replied that he had orders to the contrary and that he could not put nails in the floor. Then the plaintiff told him, "If you hold the ladder I will go up. If you don't hold it, it is impossible to finish the work." Jennings replied, "Don't you worry, I am watching y u." At this Freeman went up the ladder twenty-two feet or more and worked on what the painters called "a stretch" for a quarter of an hour, Jennings meanwhile holding the ladder. Freeman then came down the ladder and moved it to another "stretch" along the same wall. Again he told Jennings to hold the ladder as fast as possible, "to put both his feet against the legs and hold it with both hands". Before he went on to the twelve foot ladder at the top he called down, "Mr. Jennings, the floor is awfully slippery. You had better see that you can hold it." Jennings replied, "I will hold the ladder, don't you worry." Freeman for a few minutes, he says "a minute or two", "dusted off", when the ladder slipped - slid on the floor - and fell and Freeman coming to the floor was seriously injured and became unconscious. Jennings, who had been holding the ladder with one hand and his two feet, had walked away from it without warning, and this result had followed. Jennings on seeing the ladder slide turned

• *Journal of the American Medical Association* 199; 10: 100-101.

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back and tried to grab it, but was too late.

The importance of much of the elaborate arguments on each side in this appeal is eliminated by the view that we take of the legal bearing of these facts. Those arguments turn largely on the doctrine concerning the negligence of fellow servants and the dual capacity in which a foreman may sometimes act.

As regard the situation here presented, however, as one relating to the non-delegable duty of an employer to use reasonable care to furnish his employee a safe place to work. An "assumption of risk" by the servant may in some cases be a defense even where the master's duty in this regard has been neglected; but the doctrine of "Fellow Servant" or "Common Employment" has not ing to do with it.

In this case the plaintiff did not assume the risk of an unsafe place to work. He protested that he would not work on the ladder unless and until it was made safe by its being held <sup>fast</sup> at its feet. The employer through the foreman promised to so make it safe, and did so for awhile. As long as he held the ladder it was a reasonably safe place to work, or at least the employer had used reasonable care to make it so. The plaintiff was on the ladder and had no notice (as we think the jury were justified in believing) that it was to cease to be a safe place by the withdrawal of the support. He therefore assumed no risk. The employer, when the foreman left the ladder, ceased to perform his duty and is liable for the result. We cannot hold the foreman the employer's representative, performing the master's duty, when he promised to hold the ladder and while he was holding it, and a "fellow servant", for whose neglect the master is not liable, when he ceased to hold it and walked away.



We do not think that any discussion or citation of authorities on this point would make our position clearer.

Our view also renders unnecessary any discussion of the alleged errors in the giving of certain instructions and the refusal to give others on the question of assumed risk and fellow servant.

We do not think there was reversible error in the instructions given or that those refused were applicable to this case.

There was no error in admitting or excluding evidence, in our opinion, which would warrant reversal. Nor do we see anything in the conduct or language of counsel for the plaintiff in the rather heated atmosphere of the trial that calls for action or particular remark on our part.

But after very careful and attentive consideration and comparison of the evidence in relation to the injuries suffered by the plaintiff, we are unable to resist the conclusion that the damages assessed by the jury were excessive. On condition that the plaintiff within ten days remits one thousand dollars of the three thousand dollars for which the judgment was given and interest upon the said one thousand dollars from the date of the judgment, the judgment will be affirmed for the remainder. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REPLETITION;

OTHERWISE REVERSED AND REMANDED.

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GEORGE W. LIPLEY and AUGUSTA  
MULTMAN,

Defendants in Error,

vs.

CROSS S FARMING COMPANY, a cor-  
poration, and C. A. PHILLIPS,  
Plaintiffs in Error.

THE DISTRICT COURT

OF THE COUNTY OF

139 I.A. 291

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

As defendant, the Cross S Farming Company, Au-  
gust 31, 1911, delivered to plaintiffs Lipley and Maltman, in  
pursuance of previous verbal negotiations between the parties  
conducted for said Farming Company by C. A. Phillips, a deed  
conveying to them 18 acres of land in Texas at the price of  
\$1080, 30 of which was paid in cash and three notes for  
\$240 each given for the remainder of the purchase price by  
the plaintiffs, payable to the Farming Company or bearer. The  
claim of plaintiffs as stated in their petition of claim, is  
that it was a part of the agreement that the land be improved  
by the defendants putting water thereon sufficient for irriga-  
tion within 60 days, and that the defendants promised if the  
land was not so improved, to return the 30% so paid to  
plaintiffs, and the land was not improved as agreed by the  
defendants.

The testimony of the plaintiffs does not tend to  
prove the case so stated, but on the contrary, to the ef-  
fect that the buyers of the lands in the section expected to  
sink a well for irrigation purposes at their own expense; that  
each purchaser was to pay in advance towards the expense of  
sinking such well \$4.00 per acre on the land bought by him, and  
the remainder of the expense was to be paid by the purchasers





pro rata. Plaintiffs advanced to Phillips \$72, and took from him a receipt for said sum, "to apply on the well to be drilled on Sec. 90 Cross S Ranch, bal. of said well and outfit to be paid when well is completed". This receipt was given August 31, at the same time the deed was delivered. The deed recites the terms of the purchase, acknowledges the receipt of \$360 in money and three vendor's lien notes for \$240 each, and contains a general covenant of warranty.

(Phillips returned to the plaintiffs the \$72.00 given to him by them to pay towards the cost of sinking a well, and the questions presented for decision are as to the right of plaintiffs to recover the \$360 paid in money, and the right of the defendants to recover under their claim of set off the amount due on the note of plaintiffs for \$240 due at the time this suit was brought.

As to the defendants' claim of set off it is sufficient to say that the note sought to be set off is a note payable to "the Cross S Farming Company or order", and is not endorsed. It is therefore an individual demand of the Farming Company and cannot be set off against a demand of the plaintiffs against that Company and Phillips.

Friest v. Bodsworth, 235 Ill. 618;

Lyan v. Rogers, 36 id., 28.

The verbal negotiations or agreements did not become a contract until the deed was delivered and the consideration furnished. If that contract the written instrument is the exclusive evidence. The oral evidence, if admissible, would show a covenant not merely against encumbrances, but an affirmative covenant to improve the land by digging a well thereon for irrigation and to refund the purchase money paid if the water was not on the land within sixty days.



The agreement relied on by the plaintiffs was a verbal agreement antecedent to or contemporaneous with the written contract extending and enlarging its provisions, and therefore evidence of such an agreement was inadmissible. An oral promise to improve land conveyed, made by the grantors to the grantees at the same time and for the same consideration as the deed, where such deed contains covenants of general warranty, will not support an action. To hold that an action may be supported by such evidence would practically dispense with that sound rule of the common law, which finds in the written contract the exclusive and conclusive evidence of the intent and agreement of the parties, and will not suffer such written contract to be varied or affected by any contemporaneous parol agreement. The evidence, in our opinion, fails to show any right of action in the plaintiffs against the defendants or either of them, and the judgment will be reversed with judgment of nisi capiat and for the costs in this Court in favor of defendants and against the plaintiffs.

REVERSED WITH JUDGMENT HERE  
FOR DEFENDANTS, AND FOR COSTS  
IN THIS COURT.



308 - 19705

Final of 1-01.

The Court finds as a fact that the evidence fails to show any right of action in the plaintiffs against the defendants.



ALBERT KOZAK,  
Appellee,

vs.

WESTERN IRON COMPANY,  
JOSEPH ULRICH and CARRIE  
ULRICH,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

189 I.A. 306

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff Kozak was in the employ of Cerske and Dorney, who had contracted with a railroad company to clean, preparatory to painting, a steel railroad bridge which spanned the intersection of Logan Boulevard and Western Avenue. He stood on a plank supported by two trestles in the form of step ladders. The foot of one of the step ladders or trestles was on or near the west rail of a surface street railway in Western Avenue. Charles Peters was driving one horse hitched to an express wagon north in Western Avenue and a hub of his wagon struck one of the trestles, causing the scaffold to fall, and thereby the plaintiff was thrown to the ground and injured. In tort for negligence brought against the Western Iron Company, Joseph Ulrich, Carrie Ulrich and Cerske and Dorney, plaintiff had judgment against the Iron Company and Joseph and Carrie Ulrich, to reverse which they prosecute this appeal.

There is in the record no evidence to warrant or sustain the finding and judgment against the Western Iron Company. The evidence tends to show that the horse and wagon were owned and controlled by Carrie Ulrich, that the driver was employed by her, and there is no evidence tending to show that the Western Iron Company had any interest in or exercised any control over the horse or wagon, or that Peters, the driver,

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was in the employ of the Iron Company, or that the company had or exercised any control over him. We think the Court erred in denying the motion for a new trial, on the ground that there was no evidence to warrant a verdict against the Iron Company. As for such error the judgment must be reversed as to all of the defendants, it is unnecessary to consider the question whether there was evidence to warrant a verdict against the other defendants who were found guilty by the jury.

For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



IN THE ESTATE OF THE ESTATE  
OF JAMES B. JENNINGS, deceased,  
On Appeal of JAMES B. JENNINGS,  
Appellant,

vs.

JAMES B. JENNINGS, Adm. Estate of  
JAMES B. JENNINGS, deceased, et al.,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COLE COUNTY.

1901A.313

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

The Circuit Court May 3, 1913, entered an order dismissing the appeal of appellant from an order of the Probate Court disallowing and dismissing his claim against the estate of his father, James B. Jennings. The journal kept by the clerk refers to a motion filed by appellant May 7, 1913, to vacate the order of May 3, but no such motion is found in the record. May 27, a day of the next term of the court, an order was entered in the cause, that the record be amended nunc pro tunc as of May 7 to show a motion by appellant to vacate the order dismissing the appeal and for leave to file a new appeal bond, and that such motion was continued; that such motion was denied and an appeal to the Circuit Court prayed by appellant and allowed on his filing a bond.

The bond was filed and a motion to dismiss the appeal has been reserved to the hearing. Each party presented a bill of exceptions and both were signed by the Judge who entered the order of May 27. It does not appear from either bill of exceptions nor in the Clerk's record that any evidence was heard, or that there was anything before the Court on May 27 by which to amend the record of the preceding term. The statement in the brief of appellant that the order of May 27 contains the statement that "the Court having consulted the written motion filed with him May 7, 1913", is contradicted by

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the record, in which the words quoted are not found.

Because there was and is no minute, memoranda or memorial papers of the Clerk or Judge to amend by, the order purporting to amend the record of May 27 must be held void. Without such amendment the record shows no ground for the allowance at the May term of an appeal from an order made at the April term, and the appeal will be dismissed.

ALLIAL DISMISSED.

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October Term, 1915. No.

321 - 19720

H. A. FLECKLES, for the use of  
A. C. Greenbaum,  
Defendant in Error,

vs.

GENERAL FILM COMPANY, a cor-  
poration,  
Plaintiff in Error.

Error to  
Municipal Court  
of Chicago.

189 I.A. 331

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff having had judgment against the defendant, the latter filed its petition to vacate the same. This petition, by order of the court, was stricken from the files. By this writ of error defendant seeks to have reviewed the original judgment and the action of the trial judge in striking the petition.

No statement of facts, stenographic report or bill of exceptions was tendered or presented to the trial court to preserve the petition to vacate the judgment of the Municipal Court or any evidence that might have been heard by the court in considering the petition, or the action of the court upon the petition. The Supreme Court has frequently said that motions of this character do not become a part of the record unless they are made so by bill of exceptions. *Snell v. Trustees*, 58 Ill. 290; *Blair v. Ray*, 103 Ill. 615; *Jones v. Village of Milford*, 208 Ill. 621. See also *Christie v. Walker*, 126 Ill. App. 424, and *Hartenfeld v. Klein Co.*, 107 Ill. App. 88. The clerk of a court of record cannot make a written motion part of the record by copying it into the transcript. Such a motion can only be made a part of the record for the purpose of error or appeal by the bill of exceptions. *Radeke Brewing Co. v. Granger*, 101 Ill. App. 599.

A number of points are made by counsel for the defendant claiming that certain matters are not in accordance with the re-

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quirements of the rules of the Municipal Court. Under the decision in Sixby v. Chicago City Ry. Co., 280 Ill. 478, this court cannot judicially know what these rules require. Therefore we are not able to pass judgment upon the contentions made.

As there is nothing properly before this court to furnish any basis for a conclusion adverse to the proceedings in the trial court, the judgment is affirmed.

AFFIRMED.



ANTON WAITKUS,

Appellee,

vs.

ANTON OLSZEWSKI,

Appellant.

Appeal from  
County Court,  
Cook County.

189 I.A. 322

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for the value of labor and materials furnished in connection with a building belonging to defendant, and had judgment.

On this appeal it is contended by the defendant that inasmuch as plaintiff in his declaration claimed under the common counts only, while the evidence shows the work to have been done under a special contract, plaintiff cannot recover under the common counts and should have declared on the special contract. This is undoubtedly correct as a general statement, but in this case the evidence shows that after a part of the work had been performed there arose some difficulty out of plaintiff's relations with a labor union, and because of this plaintiff was not permitted by defendant to continue on the job. Under such circumstances, <sup>the plaintiff</sup> ~~XX~~ could treat the contract as rescinded and recover the value of his labor and material furnished. Among the cases so holding are Guerdon v. Corbett, 87 Ill. 272; Sanger v. City of Chicago, 65 Ill. 506; L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59; Bonnet v. Glattfeldt, 120 Ill. 166. Hence a recovery cannot be had under the common counts for the contract price of labor or materials, but only for the actual value of the work and materials. City of Elgin v. Joslyn, 136 Ill. 525; Wilson v. Bauman, 80 Ill. 493. It would follow also that a provision in the

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contract for payment upon the architect furnishing a certificate should be disregarded. Bonnet v. Glattfeldt, supra.

The trial and judgment were in accordance with the law, and the judgment will be affirmed.

AFFIRMED.



TOM K. CHAN et al.

Appellees,

vs.

ISRAEL LANSKI et al.

Appellants.

Appeal from  
Municipal Court  
of Chicago.

189 I.A. 338

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs and defendants entered into a lease dated May 22, 1912, whereby there was leased to plaintiffs the second floor of a building to be erected by the defendants, the term of the lease to begin November 1, 1912, and end October 31, 1927. In the lease the defendants acknowledge the receipt of \$1,800 from plaintiffs, which was to be applied toward the payment of rent for the last five months of the demised term. It was further provided that the premises thereby leased were part of an entire building to be erected by the defendants at the southwest corner of Indiana avenue and 31st street, in Chicago, Illinois. Said lease further provided that the defendants "agree to have said premises completed and ready for occupancy by the first day of January, 1913; provided, however, that the time within which said lessors are obligated to complete said premises herein demised shall be extended to the extent that said lessors are delayed or hindered by strikes, fire or any cause whatsoever beyond the reasonable control of said lessors. Lessees agree that in the event said premises are not completed or erected as provided herein, said lessors shall not be liable for any sums whatsoever beyond the abatement of rent and return of money deposited by the lessees hereunder, and lessees shall have the right to terminate said lease." That \$1,800 was paid is admitted, and one of the plaintiffs testified that on October 24, 1912, he paid defendants

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an additional amount of \$272, upon the agreement of the lessors to install in the premises a certain kind of art glass.

The building was not completed and ready for occupancy on January 1, 1913, and this suit is for the recovery of money paid by plaintiffs to defendants. Judgment was had for these two amounts, aggregating \$2,072.

Defendants filed an affidavit of defense, which was stricken from the files as insufficient, and default was entered for failure to file a proper affidavit. This is said to be reversible error. The substance of the affidavit of defense which was filed was that the building was not completed within the time contracted for, for the reason that there was some delay in removing some old buildings and rubbish from the ground, and further that in making excavations and laying foundations it was found that the ground contained quicksand and water in large quantities.

These circumstances, even if proven, would not be a good defense in this case. The lessors must be presumed to know that in making excavations and laying foundations for buildings in the city of Chicago quicksand and water will probably be encountered, and we must hold that the lessors contracted with plaintiffs with that knowledge.

The amount not being in dispute, there was no error in instructing the jury to return the verdict which was returned, and the judgment is affirmed.

AFFIRMED.

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October Term, 1913,

453 - 19856

GRAND LODGE INDEPENDENT WESTERN  
STAR ORDER, a corporation,  
Appellee,

vs.

ILLINOIS SURETY COMPANY,  
Appellant.

Appeal from  
Municipal Court  
of Chicago.

189 I.A. 340

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant, a surety company, from a judgment against it in a suit brought by plaintiff, a fraternal organization, on a fidelity bond. By the terms of the bond defendant guaranteed to reimburse plaintiff for such pecuniary loss as it should sustain by any act of larceny or embezzlement on the part of A. R. Fifer, Grand Endowment Treasurer of plaintiff, committed between October 21, 1911, and October 21, 1912. The bond <sup>was</sup> is in the penal sum of \$6,000. <sup>Plaintiff had</sup> Judgment <sup>was</sup> had for \$5,457.86, which <sup>was</sup> is the amount plaintiff claims Fifer embezzled from it. <sup>To secure the judgment, defendant executed.</sup> We shall notice only one of the many points urged in defendant's brief, as this alone is sufficient to defeat plaintiff's claim. In our opinion plaintiff failed to give the required notice of the embezzlement to defendant as provided by the bond. By the terms of the bond it <sup>was</sup> is provided that plaintiff "on his becoming aware of any act which may be made the basis of any claim hereunder, shall, within ten days, give the Company notice thereof by telegraph at the Company's expense, and in writing by a registered letter, addressed to the Secretary of the Company, Chicago, Illinois, \* \* \* and this Bond shall become void both as to any existing or future liabilities thereunder unless the aforesaid notice shall have been given as provided for."

The facts touching knowledge of the plaintiff of the wrongdoing of Fifer, its treasurer, are as follows: The general



officers of plaintiff were the Grand Master, who was Nathan T. Brenner; Grand Secretary, Isaac Shapiro; Grand Counsellor, William A. Jones, and the Endowment Treasurer, who is the A. R. Fifer referred to. The Grand Master, Brenner, was the supreme executive officer of the Order, and by its constitution and by-laws it was provided that "He shall have all the powers and authority of the Grand Lodge and of the Executive Board, when they are not in session, except legislative powers." He was the highest authority in all matters pertaining to the corporation when the Grand Lodge and Executive Board were not in session, and these bodies were not in session at any time between May 1, 1912, and June 10, 1912. The pertinency of these dates will appear later. It is claimed that all and each of these officers had full information that Fifer was short in his accounts or had misappropriated the funds of the Order during the first week of May, 1912, and it is <sup>conceded</sup> ~~is xxxxxx~~ that no notice was given to the defendant company until June 15, 1912. The facts tending to support this claim are that on May 2, 1912, Shapiro, the Grand Secretary, received a notice from the National City Bank of Chicago, advising him that a check of the plaintiff theretofore issued to a beneficiary had been protested, because the Illinois Trust & Savings Bank, in which the funds of the plaintiff were deposited, had refused payment for the reason that there were no funds on hand in the endowment fund in the Illinois Trust & Savings Bank, on which the check was drawn. Shapiro tried to reach Fifer, the treasurer, by telephone, and thereafter upon inquiry of the Trust & Savings Bank why the check had been protested, and being informed that there were not sufficient funds on hand to pay the same, took sufficient money and deposited it in the Trust & Savings Bank, making the check good. On that same day, upon inquiry Fifer told Shapiro that there were a number of other outstanding checks amounting to about \$2,300 that had to clear through the Illinois Trust & Savings Bank, and that

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he, Fifer, could not raise the money to deposit to meet these checks and that Shapiro would have to let him have some money for this purpose. Shapiro promised to help him, but only on condition that Fifer would inform Brenner, the Grand Master, about the situation, further stating that possibly he, Shapiro, could borrow sufficient money from Brenner to make a loan to Fifer with which to make Fifer's account good. Between May 2nd and 6th Shapiro had a conference with Brenner and informed Brenner of the situation, and at that time Brenner agreed to let Shapiro have some money, which Shapiro in turn was to loan to Fifer.

Brenner testified that it was about the 6th of May that he first heard that Fifer was short in his accounts. On the evening of the 8th of May a conference was had at the Grand Lodge office, at which were present Brenner, Shapiro, Jonesi and Fifer, all the officers of plaintiff. At this time it appeared that Fifer's shortage was \$5,457.86. There was also discussed ways and means for Fifer to raise the money with which to make good this shortage. It is unnecessary to relate the lengthy details of the transaction which was then agreed upon as the method whereby Fifer's bank account should be made whole. It involved the pledging of certain collateral securities and an interest in real estate by Fifer, in which Shapiro also was interested. After this understanding had been reached on the evening of May 8th, Jonesi, the Grand Counsellor, was ordered by Brenner to prepare papers evidencing the settlement, and arrangements were made to meet at Jonesi's office to execute the papers and arrange for the deposit of the securities. For this purpose a meeting was had on the morning of May 9th at Jonesi's office. The parties met again on the morning of May 10th, and papers evidencing the amount of the shortage were then signed; but on this date, for reasons which it is unnecessary to narrate, there arose a disagreement between the parties and the transaction for settlement was declared off, and Brenner told Sha-





piro that they would have to get right after Fifer and get the money.

It is clear, therefore, that Brenner, the Grand Master, and all the other officers, knew not only of the shortage of Fifer but also the amount thereof, on May 8th, and at the very latest by May 10th. It therefore was the duty of the officers of plaintiff, under the terms of the bond, to notify the defendant not later than ten days from May 10th of Fifer's shortage. As we have above seen, no notice whatever was given the defendant concerning the matter until June 15th. It has been held many times that under such circumstances failure of plaintiff to give notice as required by the bond, itself discharges the surety from all liability. National Surety Co. v. Long, 135 Fed. 887; U. S. Fidelity & Guaranty Co. v. Rice, 148 Fed. 206; Knight & Jillson Co. v. Castle, 172 Ind. 97, 87 N. E. 976; Long v. American Surety Co., 137 N. W. 41. The knowledge of Brenner and of the other officers of plaintiff was knowledge of the plaintiff corporation. Indiana, I. & I. R. R. Co. v. Swannell, 157 Ill. 616; Delbridge v. Lake, etc., Assn., 82 Ill. App. 388.

We are not persuaded by plaintiff's argument that the officers of the Order were merely suspicious during this first part of May. The evidence clearly shows that they had definite and accurate information as to the exact amount of the shortage, and the papers executed in the attempt to carry out the scheme for assisting Fifer to restore what he had wrongfully taken show that the parties had full knowledge of the real facts. No subsequent developments altered the situation as it was known by the officers of plaintiff to exist on May 8, 1912.

The failure to give the required notice is a complete defense, and the judgment is therefore reversed.

REVERSED.

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FINDING OF FACT.

We find that plaintiff, Grand Lodge Independent Western Star Order, failed to give to defendant, Illinois Surety Company, the required notice of Fifer's embezzlement as provided by the terms of the fidelity bond, and that under the provisions of such bond said failure renders it void.

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HARRY A. BLOSSAT,

Appellee,

vs.

SARAH BETZ ECKHARDT,

Appellant.

Appeal from  
Municipal Court  
of Chicago.

189 I.A. 341

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover the sum of \$1,250 from defendant, being the subscription price of 12½ shares of capital stock issued to the defendant by the African-American Ostrich Feather Company. Plaintiff claimed that the stock was not paid for, and defendant claimed that it was fully paid for. The trial court was of the opinion that there remained \$350 unpaid, and entered judgment against defendant for this amount.

We would be warranted in affirming this judgment for the reason that appellant has not filed in this court a proper abstract of the record. What is filed is a printed copy of the entire record. The rules also require that the abstract shall contain a complete index alphabetically arranged. No such index is given.

However, in view of the fact that both plaintiff and defendant have assigned cross-errors with reference to the amount found due by the trial court, we have given consideration to the evidence supporting the respective claims of the parties. We do not deem it necessary to state the respective claims or evidence touching upon the question in issue. This would involve a lengthy discussion of various items and would require an opinion more in the nature of an argument as to the facts and effect of various payments than would be proper. The trial court heard the various

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contentions as to the purpose and results of the different payments made, and we are unable to say that his conclusion was not justified. We certainly cannot conclude that there was any manifest error in the result reached.

The judgment will therefore be affirmed.

AFFIRMED.





493 - 19896

IONA V. HASSETT,

Appellee,

vs.

TIMOTHY F. HASSETT,

Appellant.

Appeal from  
Circuit Court,  
Cook County.

189 I.A. 342

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill against her husband seeking separate maintenance. She charges that she was, without her fault, compelled to live separate and apart from him because of his unkind, cruel and inhuman conduct. To this defendant filed his answer denying the allegations. Subsequently defendant filed his cross-bill charging desertion and praying for a divorce on this ground. To this complainant filed her answer stating that she was compelled to leave defendant because of his treatment and his failure to support her. Upon these issues there was a trial, and the chancellor was of the opinion that neither party was entitled to the relief sought, and thereupon an order was entered dismissing both the original bill and the cross-bill for want of equity. From this order defendant has appealed.

We are of the opinion that the chancellor was right in his conclusion and that the order of dismissal was proper. The record discloses that during their married life the parties disagreed about many things, - about how and where they should live, their sexual relations, clothes, money, furniture, and many other things incident to the state of matrimony. After a study of the evidence we are not able to conclude that the complainant was without fault on her part so as to entitle her to separate maintenance. There were many things she did which were unreasonable and which amounted to conduct far short of that expected of a de-

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voted and loving wife. However, we are far from excusing the conduct of the husband. It clearly appears that the wife's departure from the apartment which they had occupied was largely at his instance and suggestion and was occasioned by his treatment of the complainant. After this departure there were several conferences in an endeavor to reconcile them. This separation was not desertion within the meaning of the statute on divorce.

Each party was in fault and neither is entitled to the relief they each seek in a court of equity, and the order of the chancellor is affirmed.

AFFIRMED.



W. C. FOSTER,

Appellant,

vs.

D. SWANSON, trading as  
D. Swanson & Co.,

Appellees.

Appeal from  
Municipal Court  
of Chicago.

189 I.A. 344

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Foster, employed Swanson, the defendant, a painter, to make some repairs on a flat building belonging to plaintiff. As the work progressed and after it was completed Swanson was paid certain amounts. Subsequently plaintiff claimed to be dissatisfied with the work and refused to pay the balance defendant claimed was due, and brought suit claiming damages because of poor work, and claiming also that defendant had overcharged him. Defendant filed an affidavit of merits and also a claim for the balance said to be due him for the work. After a trial the jury disallowed plaintiff's claim and allowed defendant the full amount of his claim, and judgment was entered on this verdict.

The evidence concerns a great number of details which we shall not attempt to narrate. There was abundant testimony that the work was done in a good and workmanlike manner, and that the prices charged were the usual and customary prices for such work. There was also evidence that plaintiff saw the work while it was in progress, and made no objections but expressed himself as satisfied with it. Plaintiff moved into the building in May, 1911, and made no complaint until the following September or October, and in the meantime made several payments on account. Whatever testimony there was to the contrary was submitted to the jury, and if it was inclined to give, as it did, greater credence and weight to that

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of the plaintiff, it was justified in so doing, and we shall abide by its conclusion.

The judgment is affirmed.

**AFFIRMED.**





October 3, 1944, New York

Appellee

Appeal from  
Circuit Court,  
Cook County.

Appellant.

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1. Definition  
 2. Classification  
 3. Causes  
 4. Signs and Symptoms  
 5. Diagnosis  
 6. Treatment  
 7. Prevention  
 8. Conclusion

AFFIRMED.



577 - 19982

PETER SCHWICKRATH,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,  
Appellant.

Appeal from  
Circuit Court,  
Cook County.

189 I.A. 352

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff had judgment against defendant in an action to recover damages for personal injuries sustained as a result of a collision between a wagon in which he was driving and one of defendant's street cars in Halsted street, near West 27th street, in Chicago.

Plaintiff's story of the accident is that on the day in question he drove into Halsted street from the east on 28th street; that he looked to see if there was anything in sight and saw a car in Halsted street on the south side of 28th street, but did not know which track it was on; that he turned his team into the east or northbound track and drove northward until he got to 27th street, then turned directly out straight towards the west, when a northbound car struck him; that he did not hear the car coming from behind and did not hear any bell ring or gong sound. The testimony of two other witnesses tends to support plaintiff's theory of the occurrence.

Defendant introduced the testimony of five witnesses tending to show that as plaintiff was driving his wagon northward he was on the east side of Halsted street, between the east or northbound track and the curb, and continued driving that way until he reached 27th street; that at that time the car was about 30 feet behind him; that he then suddenly turned his team westward across the tracks in front of the northbound car; that as

CHICAGO CITY HALL  
JANUARY 1, 1900

THE CHICAGO TRIBUNE

TO THE EDITOR OF THE CHICAGO TRIBUNE:  
I have the honor to acknowledge the receipt of your issue of January 1, 1900, and to thank you for the interest and attention which you have shown in the publication of the same.  
I am, Sir, very respectfully,  
Yours truly,  
J. M. HARRIS  
CHICAGO CITY HALL

soon as he did so the motorman sounded his gong and used the stopping appliance, so that after the car struck the left hind wheel of the wagon it stopped within only three or four feet.

Counsel for the defendant urges that the verdict is not justified by the evidence, and there is much to support this contention. However, it was a very close case on the facts, and it would be difficult to say that a verdict either way was manifestly against the weight of the evidence. In such a case as this it was especially important that the defendant should have the jury instructed upon its theory of the case. *Chicago U. T. Co. v. Browdy*, 206 Ill. 615; *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243. The defendant requested the court to give the following instruction, which was refused:

"If the jury believe from the evidence, under the instructions of the court, that as the street car approached the place in question it was being operated with ordinary care and that said Peter Schwickrath drove his team in the way of the car so suddenly that the motorman had no such notice of any danger to said Schwickrath as to give him an opportunity to avoid the danger by the exercise of such presence of mind and of such ordinary care as is to be expected from a man of ordinary coolness and prudence and under such circumstances as were then surrounding him, then the court instructs the jury to find the defendant not guilty."

The defendant was entitled to have this instruction given as containing a correct statement of the law touching the conduct of the motorman. Given instruction No. 10, which plaintiff claims to be in substance the same as this refused instruction, has to do with the acts of plaintiff touching his contributory negligence, if any. We do not understand why an instruction predicated upon the same state of facts but directed towards the alleged negligent conduct of the motorman should not have been given.

The failure to give this instruction was prejudicial error, and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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PEOPLE OF THE STATE OF ILLINOIS  
ex rel. WABASH RAILROAD COMPANY  
et al.,

21027 vs.

MAXZINI BLUSSER, sitting as  
Judge of the Superior Court of  
Cook County.

189 I.A. 354

PER CURIAM.

We thought it desirable, in view of the necessity for an early completion of the transcript of the record in this Court in case No. 20832, to give this application for leave to file a petition for a writ of mandamus directed to Judge Blusser our immediate consideration. Our conclusion is adverse to the prayer of the application, and leave to file the petition for mandamus is denied.

We do not decide that we have not the power, nor that we should not under any circumstances exercise the power, of requiring matter admitted by a trial judge to be a true account of language used or occurrences happening at a trial to be inserted in the bill of exceptions by such trial judge. The question of whether we have such power is not, in our opinion, necessarily involved in the disposal of this application. We are clearly of the opinion that if we have the power we ought not to exercise it in this case. That which the relators desire to have inserted in the bill of exceptions is, according to their own presentation of the case, nothing which occurred at the trial or which could have in any way influenced the finding of the jury. It is the informal language of the trial judge to the lawyers before his final and recorded disposition of the motion for a new trial. His action speaks for





itself through the record, and the record speaks for itself as to the reasons for and against the allowance of a new trial.

As we take a view of the matter which allows us to dispose of it quite as well upon the application for leave to file the petition for mandamus, as upon such a petition and such answer to it as might be made or required, we do not think the defendant should be summoned or ruled to show cause.

APPLICATION FOR LEAVE TO FILE DENIED.

*B. T. T. d. d. d.*



JOHN J. MEANY,  
Defendant in Error.

vs.

ABRAHAM ANGLEMIER,  
Plaintiff in Error.

APPEAL TO MUNICIPAL COURT  
OF CHICAGO.

18011.357

MR. JUSTICE BAYER DELIVERED THE OPINION OF THE COURT.

Plaintiff Meany, a surgeon, operated on defendant Anglemier, removing his prostate gland and for such services recovered a judgment for \$150, to reverse which this writ of error is prosecuted. The defendant first consulted Dr. Cronin, who suggested an operation and defendant then asked if Dr. Cronin was capable of performing so serious an operation and whether he did not think he ought to have some one else and Dr. Cronin answered in the affirmative. Dr. Cronin then called plaintiff to give an opinion and he decided that the operation ought to be performed and told defendant that he would operate and defendant assented.

We think that from the evidence the Court properly found that Dr. Meany was employed to operate by defendant and that defendant was liable to him for his services, and the judgment is affirmed.

AFFIRMED.



ch Ts 14 - 19070 - 3.

PEOPLE OF THE STATE OF ILLINOIS  
for the Use of the COUNTY OF COOK  
and A. C. WEGNER, on the relation  
of A. C. WEGNER as informer,

Plaintiff in Error,

vs.

SIGMUND J. WEIZENSTEIN,  
Defendant in Error.

ERROR TO JUDICIAL COURT  
OF CHICAGO.

189 L.A. 358

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The only question presented in this case was before us in *People ex rel. v. Johnston* and other cases, 186 Ill. App., 117, and on the grounds and for the reasons stated in the opinion then filed the judgment in this case is affirmed.

AFFIRMED.

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JOHN M. BASTIEN,  
Appellee,

vs.

FORD MOTOR COMPANY, Appellant,  
and THE CHICAGO CITY RAILWAY  
COMPANY,  
On Appeal of FORD MOTOR COMPANY.

Consolidated for hearing with  
Case No. 19809.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

100 I.A. 367

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

In tort for negligence plaintiff Bastien had judgment for \$1500 against the defendants, Ford Motor Company and Chicago City Railway Company, from which each defendant appealed.

Plaintiff was the owner of a Ford automobile, which he had used a year. The Ford Company had in Chicago a shop where it repaired automobiles. In this shop one Walters was employed as a mechanic "to overhaul motors". On the day of the accident plaintiff telephoned the Ford Company, asking, "Can I bring my car down to locate a rattle?" and was told that he could. The same afternoon he took his car to the Ford shop, was introduced to Walters and told by Nicoll-ett, who was in charge of the shop, "Here is a good man to take out and locate the rattle." Walters had quit work for the day and was about to go home. He lived three miles south of the Ford shop and plaintiff lived several blocks farther south. Walters got into the car with plaintiff, who drove it south to 23rd street. There, on the suggestion of plaintiff, he and Walters changed seats, Walters taking the steering wheel and plaintiff sitting by his side. At 32nd street plaintiff told Walters to turn into 32nd street. Walters did so, proceeded east to Indiana avenue, and there





the car was struck by a Chicago City railway car and plaintiff sustained the injuries complained of.

The business in hand was the locating of a rattle in plaintiff's car, and the Ford Company furnished to plaintiff Walters to aid in locating the rattle. But the car was not surrendered to or placed in the possession of the Ford Company, but remained in the possession and under the control of the plaintiff. Plaintiff at first drove the car, then, at the suggestion of plaintiff, Walters took the steering wheel. Plaintiff told Walters where to drive the car. The Ford Company had no power or authority to control Walters in the driving of the car and had not assumed the service of driving or operating the car. There has not been a scintilla of evidence pointed out which indicates that the Ford Company could direct or control the movements of the car or the method of driving it. The plaintiff was in charge and control of the car and Walters in driving it was not the servant of the Ford Company, but pro hac vice the servant of the plaintiff.

Adams v. Cost et al., 52 Id., 264.

In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim qui facit per alium facit per se directly applies. Kenn v. C. C. Ry. Co., 232 Ill., 378. On the facts shown by this record the negligence of Walters, if any, cannot be imputed to the Ford Company, and as the right of recovery against that Company is based on the theory that the said Company is liable for the negligence of Walters, it follows that no right of action is shown against the Ford Company, and the judgment will therefore be reversed.

REVERSED.

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358 - 19758

FINDING OF FACT.

The Court finds as a fact that the defendant Ford Motor Company is not guilty of any negligence which caused or contributed to the injuries to the plaintiff for which he recovered.



JOHN E. BASTIEN,  
Appellee,

vs.

CHICAGO CITY RAILWAY  
COMPANY, Appellant,  
and FORD MOTOR COMPANY,

On Appeal of CHICAGO CITY  
RAILWAY COMPANY,

Consolidated for hearing  
with case No. 19758.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

189 I.A. 339

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

There is a general statement of the facts of this case in the opinion filed herewith on the appeal of the Ford Motor Company from the same judgment from which this appeal is prosecuted by the Chicago City Railway Company, to which we shall refer and treat as an opinion filed on this appeal so far as applicable.

Each count of the amended declaration alleges that the Railway Company so negligently ran its street car and the Ford Company so negligently ran the automobile that by reason of such negligence the car and the automobile collided and thereby plaintiff was injured, etc.

We hold, on the grounds and for the reasons stated in the opinion on the appeal of the Ford Company, that the negligence of Walters, who was driving the automobile at the time of the collision, was not imputable to the Ford Company and that that Company was not guilty of any negligence which caused or contributed to plaintiff's injury. The remaining questions presented by the record are, first, whether the plaintiff was without fault or negligence contributing to his injury, and, second, whether the Railway Company negligently ran and managed its car and thereby caused

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it to collide with the automobile. As the automobile approached Indiana avenue, going east, a street car was going south on the west track in the avenue, and plaintiff and Walters testified that the automobile was stopped about ten feet west of the west track; that after the car had passed Walters started the automobile forward, and as it was on the east track a north-bound car struck it. Taking this testimony as true, both plaintiff and Walters were clearly negligent, and, as we have said, the negligence of Walters was the negligence of plaintiff. It was about six o'clock P. M. of June 19; there was no team or wagon on the street, nothing to obstruct the view of the avenue, and it is clear that if the testimony of plaintiff and Walters is true as to the stopping and starting of the automobile, either might have seen the approaching car in time to stop the automobile before the car reached the north-bound track. Their testimony that they continually looked to the south and did not see a car until the automobile was on the north-bound track and only ten feet away, must be rejected as descriptive of a physically impossible occurrence and not in accordance with the truth.

C. & E. I. R. R. Co. v. Kirby, 86 Ill.

App. 57;

C. P. & St. L. Ry. Co. v. DeFretas, 109 id.  
104;

C. & A. Ry. Co. v. Vremeister, 112 id., 346;  
Mena v. C. C. Ry. Co., 147 id. 421;  
Livingston W. & V. Co. v. R. R. Co.,  
170 id. 424.

Plaintiff was in control of the automobile, and even if the negligence of Walters was not his negligence, was bound to exercise reasonable care for his own safety, and

certifying



this the evidence shows he failed to do.

If, as the great preponderance of the evidence tends to prove, the automobile was not stopped west of the south-bound track, but proceeded to cross the railroad tracks at a speed of ten or fifteen miles per hour, the negligence of the plaintiff is equally clear.

As the judgment must be reversed on the ground of contributory negligence on the part of the plaintiff, it is not necessary to consider the question whether the Railway Company was guilty of negligence.

The judgment of the Circuit Court is reversed.

REVERSED.



FINDING OF FACT.

The Court in this case finds as a fact that the plaintiff, John E. Bastien, was guilty of negligence which contributed to the injury for which he recovered.



THE PEOPLE OF THE STATE OF ILLINOIS, )  
Defendant in Error, )

vs. )

JOHN LYBAUGHT,  
Plaintiff in Error. )

APPEAL TO MUNICIPAL  
COURT OF CHICAGO.

100 ILL. 371

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was found guilty of assault with a deadly weapon on an information which charged that such assault was committed within the territorial limits of the City of Chicago, but the evidence wholly fails to show that the alleged assault was committed within the city. The Municipal Court has no jurisdiction to try cases arising beyond the territorial limits of the City.

Miller v. The People, 230 Ill., 65.

For the failure to prove that the alleged assault was committed in the City of Chicago, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



NORTH SIDE SASH & DOOR CO.,  
Defendant in Error,  
vs.  
MARY SCHUETZ,  
Plaintiff in Error.

Error to  
Municipal Court  
of Chicago.

189 I.A. 379

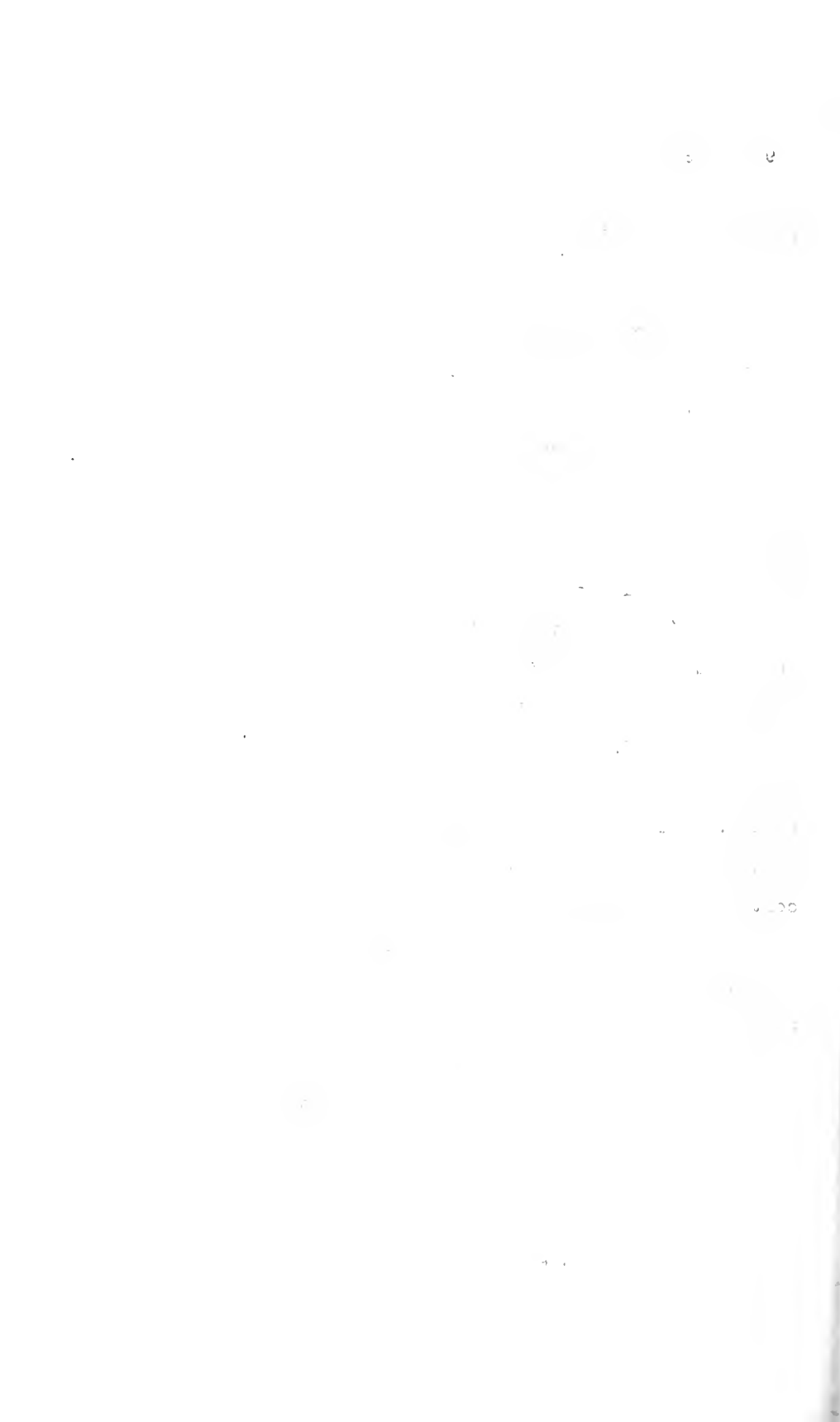
MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a sub-contractor, recovered judgment for a mechanic's lien on premises belonging to the defendant, who claims that the record shows the following reversible errors:

(1) That the contract between the original contractor and the defendant provided that no liens should attach to the premises. The contract was executed in duplicate, and while one copy contained a provision that the building should be constructed free from liens, the other copy contained no such provision. We think that the trial court was justified from the evidence in finding as he did - that the contract when executed contained no provision that there should be no liens.

(2) It is said that there was no service of a notice of claim of lien by the sub-contractor, as is required by the mechanic's lien act. This act also provides that such notice is unnecessary when the original contractor furnishes the owner a sworn statement showing the names of sub-contractors and the amounts due them. It appears from the testimony that such a statement was furnished and that it was in evidence as an exhibit, but the defendant has omitted it from his bill of exceptions. We must therefore presume it was sufficient notice to the owner of the amount owing to the plaintiff.

(3) It is said that the judgment exceeds the amount





named in the summons. The abstract of the summons does not show the amount claimed, and the judgment is not in excess of the amount claimed in the statement of claim.

Other errors alleged are also without merit.

When it appears that the bill of exceptions, as in this case, does not include all the exhibits, this court will presume the sufficiency of the missing documents to justify the finding of the trial court.

The judgment is affirmed.

AFFIRMED.



21 - 19196

BENJAMIN OHNKIN,  
Defendant in Error,

vs.

SOLOMON SMOILER,  
Plaintiff in Error.

Error to  
Municipal Court  
of Chicago.

189 I.A. 380

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

The only difficulty in this case is to ascertain just what took place between the parties upon the occasion of the controversy between them, but we are of the opinion that the trial court was justified from the variant testimony in finding the facts to be substantially as follows: Plaintiff, a tailor, had two or three times bought goods from the defendant, a jobber. Defendant claimed that on October 27th, the day in question, plaintiff was indebted to him for goods to the amount of \$26.30. On this day plaintiff came into the store and bought some goods, amounting to \$22, for which he paid defendant cash. These goods were done up in a bundle and delivered to plaintiff, and the \$22 was handed to defendant. The bundle was left for a short time on the counter, while plaintiff looked at other goods, and thereupon the defendant took the bundle, and when plaintiff inquired where his bundle of goods was defendant replied, "You owe me enough dollars, and you get cut," at the same time shoving the plaintiff out of the store.

Defendant's story is to the effect that the \$22 was paid by plaintiff to apply on the old account, but we think the trial court was right in believing that defendant undertook forcibly to collect this money to apply on the account in the manner above described. There had been a delivery of the bundle to plaintiff and the goods belonged to him, and when defendant took them he

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took property belonging to the plaintiff. Hence an action in trover was proper, and the judgment is affirmed.

AFFIRMED.



ALBERT A. SMITH,  
Plaintiff in Error,

vs.

ROBERT C. CLARK,  
Defendant in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 382

MR. JUSTICE MOSBURN DELIVERED THE OPINION OF THE COURT.

Plaintiff, claiming under a chattel mortgage, sought to obtain by replevin household goods in the possession of defendant under a distress warrant. The trial court held adversely to plaintiff and a writ of replevin habendo was ordered to issue. In the body of the chattel mortgage it purported to have been made by Catherine D. Pearce and George C. Pearce, and apparently they signed it, but the Clerk of the Municipal Court, before whom the acknowledgment was made, certifies that the persons acknowledging it before him were Arthur D. Pearce and George C. Pearce. This is not in compliance with the statute, which requires a chattel mortgage to be acknowledged by the mortgagors. In the absence of an acknowledgment by Catherine D. Pearce the mortgage will not be effective against the estate of defendant. Further, the mortgage purported to have been given to secure a note of even date which, by the language of the mortgage, became "due and payable on or before 35 months after date of option of the legal holder thereof." Manifestly this is no time at all. These defects may arise from clerical errors, but they are errors of which a third party may take advantage.

The possession of the defendant being lawful, it was necessary that a demand for the goods be made upon him before suit was commenced. This necessary demand was not made.

For any or all of these reasons the judgment was correct, and it is affirmed.





80 - 19994

GEORGE F. SCHUMANN,  
Defendant in Error,

vs.

NEAL KARL EIKOOS,  
Plaintiff in Error.

Error to  
Municipal Court,  
of Chicago.

1891A.383

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

In his statement of claim plaintiff alleged that his claim was for groceries and meats sold and delivered to defendant at his request by certain business firms, giving their names. Summons was served on defendant, who was defaulted for failure to appear, and judgment for plaintiff was entered for the amount claimed. Subsequently defendant petitioned the court to set aside the default and to vacate the judgment, claiming that he had had no dealings with plaintiff. Plaintiff answered that at the time he commenced suit he was the owner by assignments of the claims mentioned in his statement of claim, and on motion he was given leave to file the assignments, which was done, and thereupon the court denied defendant's motion to vacate the judgment. *To reverse the judgment, defendant has contended and proven*

The validity of the assignments is not questioned, but the defendant says that the plaintiff failed to observe the statute, which requires the assignee of any chose in action, in his pleadings, or by affidavit where pleading is not required, to "allege that he is the actual bona fide owner thereof and to set forth how and when he acquired title." Illinois Statutes, ch. 110, sec. 18. Undoubtedly this is the requirement of the statute, and the proceedings in the trial court in this respect were irregular, but as there is no claim of any defense to the claims on the

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merits, and as the assignments to the plaintiff are valid, we see no good reason to reverse the judgment solely because of the informality of procedure.

The judgment is affirmed.

AFFIRMED.



184 - 20108

HERBERT MILLER, a minor, by Fred  
Miller, his next friend,  
Defendant in Error,

va.

MRS. FRANK G. SPREYNE et al.,  
Plaintiffs in Error.

} Error to  
Municipal Court  
of Chicago.

189 I.A. 384

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, whose parents were tenants in a building belonging to defendants, was injured by the falling of a stone step in a passageway used in common by plaintiff's family and other tenants in the building. He brought suit by next friend and was awarded by a jury \$600, and judgment was entered on the verdict.

It seems to be conceded that defendants are liable if they failed to exercise reasonable care to keep the steps in proper repair. Shoninger Co. v. Mann, 219 Ill. 242. Defendants sought to show by testimony that they had used reasonable care in that once or twice they had attempted to secure the stone in place; but the jury was amply justified in believing that to do this it was necessary to fasten the stone in place with cement or mortar, and that no cement or mortar was used, and that what had been there had crumbled away. We see no reason to disturb the conclusion of the jury that the defendants were guilty of negligence as charged.

It is said that some portions of the attending physician's testimony were inadmissible, and that there was a conflict in the testimony offered on behalf of the plaintiff as to the number of visits made plaintiff by the physician. However this may be, the court instructed the jury to disregard the alleged



inadmissible testimony, and the amount of the verdict does not indicate that the jury was improperly influenced as to the seriousness of the injury. The accident caused a hole in plaintiff's leg, penetrating to and affecting the bone; the bone was described as "rotted" and part of it was removed. Plaintiff was confined to bed for a month and could not use the leg for seven or eight weeks. We do not think the verdict of \$600 was excessive.

The judgment is affirmed.

AFFIRMED.





CITY OF CHICAGO,  
Plaintiff in Error,

vs.

DAVE LEWINSOHN,  
Defendant in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

1091A.336

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant, the keeper of a saloon in the City of Chicago, was charged with the violation of the city ordinance which prohibits keeping open a saloon between the hours of one o'clock A. M. and five o'clock A. M. Upon the trial a witness on behalf of the City testified that on the morning in question, January 1, 1913, shortly after one o'clock, he saw 25 or 30 people drinking at the bar in defendant's saloon. The defendant, testifying on his own behalf, admits this to be the fact. Therefore it was undisputed that the saloon was open in violation of the ordinance, but the trial court found the defendant "not guilty." Nothing appears from the record to justify this finding, and defendant does not appear in this court to urge any reasons in support of the judgment.

As the finding was directly contrary to the conceded facts, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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|----------------------------|---------------------|---|--|
| OLIVER TYDINGS,            | Defendant in Error, | } | Error to<br>Municipal Court<br>of Chicago. |
| vs.                        |                     |   |  |
| FARRINGTON AUTOMOBILE CO., | Plaintiff in Error. |   |  |

1891A.387

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant seeks to have reversed a judgment obtained by plaintiff in a suit claiming a breach by defendant of a contract to furnish plaintiff an electric automobile. The contract was in writing, and by it defendant undertook for a certain price to furnish an Ohio Electric, "1913 shaft drive, O type," body to be of standard design and "painting, Ohio Blue; upholstery, 919 whipcord"; delivery "on or about 10 days." Plaintiff made a deposit of \$100, and the contract provided that if there was no delivery this deposit was to be refunded. Defendant agreed to allow plaintiff on the price of the electric car \$600 for his Franklin gas car which was to be traded in. Plaintiff claims a failure to deliver the electric according to the contract, and the trial court held favorably to this contention and allowed plaintiff as damages \$700, being the amount of the \$100 deposit and \$600 for the Franklin car, which had been delivered to defendant and sold by it. From this amount was deducted \$225, the price of a "rectifier," sold by defendant to plaintiff, which is not in dispute, and judgment against defendant for \$475 was entered.

The contract is dated May 19, 1913, and it is conceded by the defendant that the car was not delivered within ten days thereafter, but it claims that the delay was caused partially by the slowness of the wife of plaintiff in making selections of

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style and color of upholstering, and also by reason of the fact that the color "Ohio Blue" and the upholstering selected by Mrs. Tydings were not such as were used in its standard car but required special work to supply, thus taking longer time to finish the car; that on May 30th the provision as to time of delivery was waived. This so-called special work was done at Toledo, Ohio, and the car arrived in Chicago June 19th, and on the 20th plaintiff and his wife inspected the car and seemed to be satisfied with it except as to the paint, which was soft. On June 23rd plaintiff sent his wife for the car, and a salesman accompanied Mrs. Tydings in the car to the office of plaintiff for the purpose, as she said, of getting a check from plaintiff for the balance due on the car. Plaintiff and his wife then inspected the car as it stood in front of the building in which plaintiff had his office. They then, with the salesman, went to plaintiff's office and plaintiff drew a check for the balance. It is claimed that there was then a dispute between plaintiff and his wife which resulted in plaintiff tearing up the check and the salesman leaving with the car.

Considerable evidence was taken and there is much argument touching the character of the upholstering, but as there must be another trial for the reason hereinafter indicated, we shall not give any conclusions we may have as to the facts. Another reason why we do not comment upon the facts may lie in this, that upon the trial the car in dispute and also another car were brought in as exhibits and were inspected and examined by the trial court with reference to the questions of fact concerning the condition of the particular car in question. Of course these exhibits are not before us, and there has not been preserved anything to apprise us as to what the trial court saw or as to his judgment upon the condition of the car, except as this may be inferred from his finding. It is urged by counsel for the plaintiff that this precludes



us from passing upon the facts contrary to the conclusion of the trial court; and counsel for the defendant seems to concede this.

We do not think it necessary to pass upon this question, for we are clearly of the opinion that the court committed error in its ruling as to the admissibility of testimony. The testimony offered by the defendant as to the actual value of the Franklin car taken in exchange, was held to be inadmissible and defendant was not allowed to introduce testimony on this point, the court seemingly being of the opinion that the contract price of \$600, at which the parties agreed the Franklin car should be traded in, was conclusive on both the parties to the contract. We do not think so. It may be prima facie evidence of the value but it is not conclusive, and the true value may be shown by proper evidence. The trading value of property is not necessarily its market value. It was harmful error to refuse to allow defendant to introduce testimony as to the market value of the Franklin car.

It is unnecessary to notice other points made.

For the reason indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.





309 - 20242

ALMA BARGINDE,

Appellee,

vs.

EWALD BARGINDE,

Appellant.

Appeal from  
Superior Court,  
Cook County.

139 I.A. 330

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill for separate maintenance, alleging cruelty and drunkenness of the defendant, who by his answer denied the charges. After hearing, the court granted a decree of separate maintenance and ordered defendant to pay complainant for the support of herself and a minor daughter the sum of eight dollars per week.

From this decree defendant has appealed, saying that the finding of the court sustaining the charges of the bill is contrary to the evidence. We do not think so. The testimony shows that the defendant was frequently intoxicated and several times was brought home in that condition in the early hours of the morning; that on one occasion, the birthday of complainant, while some old friends were calling on her, defendant came in drunk and beat her severely; that again, on Easter Sunday, defendant struck complainant and beat her so that her face was badly swollen and bruised. The testimony of the physician who treated her at this time is specific as to the extent and severity of the injuries. Other like occurrences were testified to by witnesses, including adult children of the parties. The testimony on behalf of the defendant as to the alleged quarrelsome conduct of the complainant has been considered by us, but taking the entire record we see no reason to change our opinion that complainant was entitled to a decree for separate maintenance.

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Neither are we impressed by defendant's claim that the amount of alimony is not justified. There is nothing in the financial condition of the defendant which would make these payments difficult, and it cannot reasonably be said that eight dollars a week for the support of complainant and her minor daughter is too liberal.

The decree is affirmed.

AFFIRMED.



MISS CONA Litch, Administrator  
of the Estate of Frank Rosatka,  
deceased,

Appellee,

vs.

F. LINDSEY GARDNER, a corporation,  
Appellant.

MR. JUSTICE ROSS. (Syllabus by Mr. Justice Ross.)

This is an appeal from a judgment rendered by Albert Schneider, administrator, for the estate of Frank Rosatka, hereinafter called "plaintiff," against the defendant. Defendant owned a large building, used for the storage of various articles, assembled in some large metal barrels, one of which was five feet five inches high, three feet four inches in diameter, inverted, about ten inches high, and a small barrel standing about six inches high. The building was about four feet ten inches in diameter. In the morning of August 11, 1912, plaintiff, while working in the shop of the defendant, was killed by a falling barrel, and plaintiff's estate is entitled to recover damages. The death was caused by the fall of the barrel, and the facts seem to be undisputed.

(In behalf of plaintiff, a witness testified that about 2:30 o'clock on the afternoon of August 11, 1912, the plaintiff, Lindsey, said to the plaintiff, "Frank, get some more barrels. I want you to paint some battery cells on the barrels."



ere"; that plaintiff went immediately to the paint barrel, took a can with paint, then mixed it with gasoline, and went with the foreman to the battery wells, and was seen with his hand on a ladder which was leaning against the well in which his body was subsequently found. Contradicting the foreman's testimony, the foreman testified that his order was: "Go down and finish the job no was on that; and some bottoms of wells are painted, to hunt me up and let me know, and I would show him I wanted done." Another witness gave testimony tending to corroborate the foreman. Respective counsel seek to support each story by evidence and argument concerning the circumstances of the situation and the usual manner of doing the work. In this instance it is strongly urged by the defendant that the inside walls of the wells were never painted, but only the bottoms. This is disputed by testimony to the effect that sometimes the inside was painted.

The determination of the issue as to the form of the order resolves itself largely into a question as to the credibility of the witnesses. After considering this, we are prepared to say that the jury should have disbelieved plaintiff's witness Lapp rather than the story of the defendant's witnesses and there are no surrounding conditions which make Lapp's story impossible or even improbable. We see no ground for concluding that the judgment of the jury in this regard is manifestly against the weight of the evidence, and therefore we must consider plaintiff to have proved his order of a specific order. The jury could properly believe from the evidence that paint and gasoline used in such a receptacle would give off fumes dangerous to the life of one working in it, and that the defendant must be held negligent in giving the specific order without warning of the dangers.





The original and plaintiff's case of contributory negligence is not convincing. It seems based upon speculations as to the length of time which would elapse before the gas would affect plaintiff as he worked in the well. The time elapsing for the gas to be estimated the time as much longer as it would appear to take to do the job of plugging. From the inference is suggested that plaintiff did not finish the job or remained inside the well to wait after finishing work. On the other hand witnesses testified to extraordinary things to show that the gas did affect him the first night felt in a few minutes; so that it cannot be said very early that plaintiff remained inside of the well longer than was necessary.

Neither can it be said that plaintiff entered the well. He had never before been inside one of these wells, and the jury were justified in finding that the fact of his experience in painting other articles was different in shape from every well did not make or create not necessarily have him sufficiently aware of the danger from gas to enter under the new conditions.

It is true that the custom of putting the workman's safety is on the party assuming it, and there is practically no direct evidence as to the conduct of plaintiff in this respect. He was a leader not only as a man of entering the well, but evidently for the purpose of entering the well when he had finished his work. As far as the mechanical means are concerned, he must be held to have taken care for his own safety. He was not under any such plaintiff's actions did not enter the well, and the fact that he painted the inside. It has been held in many cases that under similar circumstances the plaintiff is entitled to the



assumption that men naturally seek to avoid injury and to preserve their own lives. This rule has been repeatedly affirmed in Illinois Central R. Co. v. Louisville, 187 Ill. 121, 122; C. & N. W. Ry. Co. v. Sawyer, 179 Ill. 121; C. & N. W. Ry. Co. v. Sawyer, 179 Ill. 121; C. & N. W. Ry. Co. v. Sawyer, 179 Ill. 121; C. & N. W. Ry. Co. v. Sawyer, 179 Ill. 121. It is said in this case and care for plaintiff's own safety has been sufficiently proven.

Complaint is made of the giving and refusal of instructions. It is said to be error for the court to have given at plaintiff's request instruction no. 3, in that it authorizes the jury to consider not only what the parents of the plaintiff might reasonably have expected if he had lived, but also what his adult brothers and sisters might have expected. We do not think the instruction can properly be so construed. By its language the jury is expressly limited to the consideration of the testimony upon this question, and is told that the jury might believe only what the evidence showed the next of kin might reasonably expect in a pecuniary way. The only evidence as to pecuniary benefits from the plaintiff was that he was eighteen years old, earned \$100 per week, and had always given all he had earned to his mother. In this connection it should be noted that in City of Chicago v. Peck, 114 Ill. 325, the court said on this subject:

"The question is, in its nature, a question of fact, and the jury should therefore calculate the damages in reference to a reasonable expectation of benefit, be it of right, or otherwise, from the continuance of the life. Parents, and even brothers and sisters, might reasonably expect, in many cases, to derive pecuniary benefit from the continued life of the intestate, be it of right or otherwise, if not of right, at any rate of life, and our statute imposes the duty of support, in the event of their becoming paupers, of the parent by the child, and of the mother or sister by another brother or sister."



This is quoted with approval in *W. v. W.*, 101 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is said that it was not error to give these instructions in view of the fact that the jury was not only in this court in *United Brethren Co. v. McDonald*, 118 Cal. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Complaint is made of the refusal of defendant's offered instructions Nos. 33, 34 and 35. These instructions correctly stated the law with reference to defendant's, and in a proper case might well have been given, but in the present case we do not think it error to have refused them for the reason that they contained only an abstract statement of the law, ignoring entirely the theory and proof of plaintiff that the plaintiff was obeying a specific order. Defendant's instruction No. 27, which the refusal, was properly covered by given instruction No. 1. Refused instruction No. 33 was covered by given instruction No. 10. Instruction No. 34 was covered by instruction No. 27, and refused instruction No. 35 was covered by given instruction No. 1. It is said that there is no reversible error with reference to the instructions.

It is said that the case should be reversed because of improper conduct of counsel and counsel in the trial of the case. It is said nothing is said in the record as to the conduct of counsel of sufficient importance to require a reversal, and there is some warrant for the contention that the court in the trial made improper rulings and instructions, and it is said that some of the things said were such as to be improper - yet we do not feel that we should reverse the judgment in this cause. It appears that some of the most objectionable



We do not consider the verdict of \$5,000 for the death of a young man over eighteen years of age, the support of his mother, to be excessive.

The judgment is affirmed.

APPELLATE.





1 Term 1913  
531 - 19836

SAMUEL E. ERICKSON,  
Appellee,

vs.

Appeal from  
Superior Court,  
Cook County.

FRED MILLER BREWING COMPANY  
et al.,  
on Appeal of  
FRED MILLER BREWING COM-  
PANY,

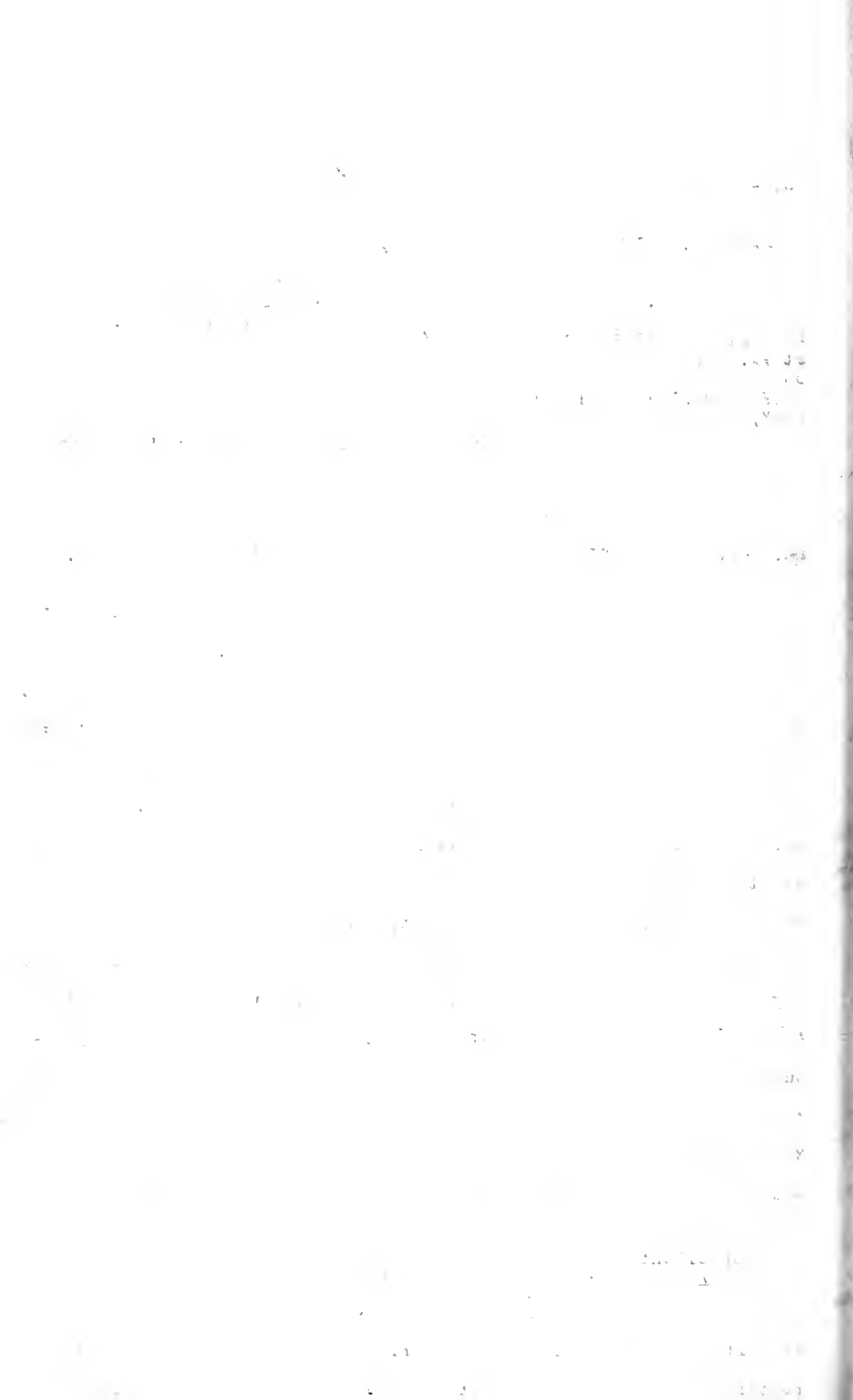
Appellant.

139 I.A. 394

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, brought an action in tort against appellant and the Chicago Railways Company.

On April 29, 1913, when the case was called for trial, appellant made a motion for continuance, supported by affidavit setting forth absence of a witness, the material facts expected to be proven by him, and the necessity of taking his deposition. The Railways Company, having no notice of the motion, was not represented at the hearing thereof. But plaintiff was present and admitted that the absent witness, if present, would testify as alleged in the affidavit, whereupon the court denied the motion, the order reading on "plaintiff's admittance.") Under Section 62 of the Practice Act governing the practice in such matters, the Brewing Company unquestionably had the right to read such affidavit in evidence at the trial so far as it was material to the issue between it and plaintiff. No question as to its materiality was made or arisen on the record. When it was offered at the trial counsel for appellant recognizing that, under the circumstances, it should be limited to the issue between <sup>appellant</sup> and plaintiff and not be received to affect the liability of the Railways Company, which had made no such admission, asked that it be received with an appropriate instruction, making such restriction. Plaintiff first objected to limiting the effect of



the evidence and later joined with the Railways Company in objecting to its introduction at all, though he now contends that the record is not capable of that construction.

The offer of the affidavit seems to have been considered from the point of view that the admission made by plaintiff's counsel, on which the order for continuance was denied, was conditional upon the case going to trial immediately. This was plaintiff's contention. But the motion and order thereon speak for themselves with respect to that question. No such condition is contained in the order, and in view of the fact that the case remained upon the daily trial call until actually reached for trial, without any delay for which appellant was responsible, the contention made that the affidavit was to be received only in the event the case went to trial immediately, is utterly inconsistent with the circumstances of record and the intent of the statute. There was an interval of about six weeks between the time of entering such order and the trial of the case, occasioned solely by the fact that other cases on the call were given precedence. Necessarily it could not be told in advance when it would be reached. It was contended that enough time elapsed within which to take the deposition of the absent witness. But the order was not conditional upon appellant's effort to obtain such a deposition. No question of want of diligence to procure the witness' deposition was therefore before the court at that time, and it was a misapprehension of the effect of the order to hold that appellant was precluded from offering the affidavit at the trial.

The grounds, therefore, upon which plaintiff urged his objection and upon which the court apparently ruled, wrongfully resulted in its entire exclusion.

Plaintiff contends, however, that he merely objected to limiting the evidence by instruction, and that as the court then turned to counsel for the Railways Company and asked if he objected,

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and on his replying "yes" sustained the objection, the exclusion was upon the objection of the Railways Company and not that of plaintiff. This is somewhat technical, as will appear from the record. After the ruling further discussion as to the admissibility of the affidavit ensued between the court and counsel for the respective parties, and counsel for plaintiff offered to withdraw his objection provided no instruction was given limiting the effect of the evidence and added, "but, if there is objection on the other side and if that instruction is offered, then I object to the admission of the affidavit at this time." Thereupon the court said, "The court has made its ruling." Under such circumstances, we fail to see how counsel for plaintiff can consistently contend that his objection had nothing whatever to do with the exclusion of the affidavit. He knew that to give effect to his admission, the affidavit must necessarily be received with the restriction asked for so long as the Railways Company was not bound by his admission, and his objection to the limitation of the effect of the affidavit, was tantamount to an objection to the admission of the affidavit at all if he was not to have the benefit thereof against the Railways Company, which under the circumstances he had no right to claim.

It is not unusual in tort cases for evidence to be received against one co-defendant and not another. It is too well settled for discussion that "where evidence is competent for any purpose, it must be admitted, and if its application should be restricted that may be done by an instruction." (Mighell v. Stone, 175 Ill. 261; C. R. I. & P. Ry. Co. v. Clark, 108 id. 116; Farwell v. Warren, 51 id. 467.)

But, plaintiff urges that the affidavit was not competent because the facts set forth therein relate to negligence of the Railways Company and not to any on his part. In reply it is enough to say that they clearly tend to show also the exercise of

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ordinary care and want of negligence on the part of appellant. These facts, which appellant relied on the affidavit and admission to prove, were vital to its defense, and wrongfully excluded. It was no justification of the court's ruling that the evidence might operate prejudicially to the co-defendant. (Cyc. in Evid., Vol. 3, p. 188.)

Plaintiff seeks to make use of appellant's refusal of an offer by the Railways Company to withdraw its objection if appellant would allow an ex parte affidavit procured by said company from the absent witness to be received in evidence. Appellant's right to the benefit of its affidavit depended entirely on plaintiff's agreement and not appellant's acceptance of the company's proposal.

Appellant complains of the court's ruling excluding statements of another person, so clearly conclusions and expressions of his opinion that they were properly rejected. But for the error in excluding said affidavit the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.





JOSEPH SZINKUS,  
Appellee,

vs.

STEPHEN RAGAUCKAS et al.,  
Appellants.

Appeal from  
Circuit Court,  
Cook County.

189 I.A. 107

Statement: This is an action for libel brought by appellee against appellants and others who were dismissed from the case. All were members of a musical and dramatic organization called the "Lithuanian Youths' Circle." At one of its entertainments, appellee was on a committee that had charge of collecting the proceeds therefrom. At a later entertainment, he had charge of the wardrobe and collected the proceeds from the same. From the latter fund he retained the sum of \$4.70, claiming that he overpaid the society that much from the proceeds of the first entertainment. A controversy and dispute over his right to the sum so retained having arisen in the society, it passed a resolution demanding it from him and threatening to publish his conduct in the newspapers if he did not pay it. In pursuance thereof an article, the original of which was signed by appellants, was published on May 5, 1911, in a Lithuanian paper and language, the translation of which is as follows:

"On the 29th of January of this year this Society played the play 'Valkata.' J. Szinkus, a member of this Society, was appointed in wardrobe, who charged 10 cents to each person for their clothing they left, but he kept the money, \$4.70, himself. At first monthly meeting, after the play, he was asked for an explanation. J. Szinkus just told this much that he got the \$4.70, but that he will not give it back. Violent uproar; J. Szinkus was asked if he cannot show for what reason he kept the money, and if he cannot show the reason he ought to return it to the Society Treasurer; but instead of that he said he would not belong to Society and went out. We will mention that this was not the first time this happened with J. Szinkus. While he was organizing the Committee of this play, he used to give us an account in two or three months, but his account never used to agree with the sum of money which he used to turn in to Society, and he used to tell that he made mistakes in his account, or that he lost the money from his pocket. As he was of the same nationality, and a member of this Society, Society used to forgive him for a few dollars. The way he acted is very unfortunate. This Society is forced to let the public know about him."

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The suit was commenced by filing a praecipe October 16, 1911, and issuance of summons on the same day. The declaration was filed September 18, 1912, consisting of one count, alleging in due form that by said article therein set forth it was intended to charge that plaintiff had "feloniously stolen and carried away certain moneys of said society," and claiming special damages to his reputation, credit and business.

Pursuant to an order entered October 8, 1912, an alias summons was issued and served on three of the defendants. All of them afterwards entered a general appearance and filed general and special demurrers, which were overruled, whereupon defendants filed pleas of not guilty, justification and the statute of limitations. A demurrer to the plea of statute of limitations was sustained. The verdict in favor of plaintiff was for \$1500, and there being a remittitur of \$300, judgment was entered for \$1200. *as entered the court*

*defendants appeal*

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

We need not discuss the contention that the alias summons was void, since, by entering their general appearance and defending on the merits, appellants waived any objection to the summons or service, (Mix v. The People, 106 Ill. 425); nor the correctness of the ruling on the demurrer to the plea of the statute of limitations as the filing of the praecipe and issuance of the summons constituted the commencement of the suit, (Schroeder v. Mer. & Mech. Ing. Co., 104 id. 71,) and they were filed within the statutory period. Nor did the court abuse its discretion in refusing to allow withdrawal of the general appearance and entry of special appearance by defendants.

It is argued that the article is not libelous per se and that the court should have so held and instructed the jury accordingly. The question is not involved in the case. The action

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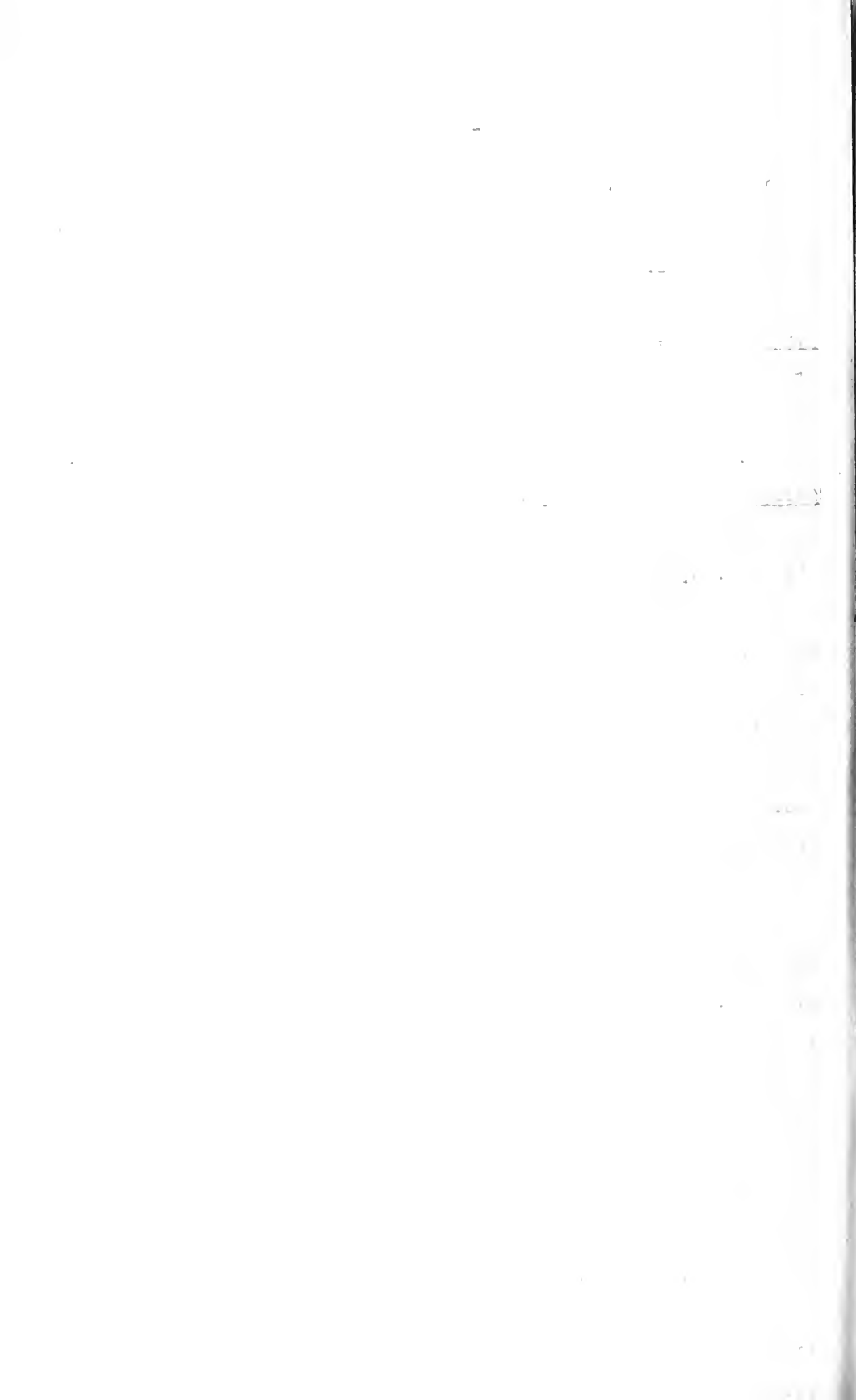
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was not brought on the theory that the article was libelous per se, but that the averments in the innuendo made it libelous (Gerald v. Inter Ocean Pub. Co., 60 Ill. App. 205, 210), and that special damages resulted from its publication. While the article is not prima facie defamatory and libelous, it is reasonably susceptible of the meaning ascribed to it in the innuendo, and the court acted properly within its province when it held that it was capable of such meaning and left the jury to determine the meaning intended. (Gerald v. Inter Ocean Pub. Co., *supra*, and cases cited.) Besides the plea of justification alone required submission of the case to the jury. (Gault v. Babbitt, 1 id. 130; Newell on Slander, p. 832.)

It is next contended that there was no proof of express malice. If the published words were intended to impute to the plaintiff the crime of larceny, then malice would be implied from the very use thereof (Hintz v. Graupner, 138 Ill. 158-165, and authorities cited), and this implication is not overcome merely by defendants' denial of malice or of certain expressions attributed to some of them by plaintiff indicating malice.

Nor can we concur in the contention that because appellants were officers of the society and carried into effect its resolution for the publication, the article was a privileged communication. Their action in so doing was wholly apart from any duty that it could reasonably be said they owed the society. They procured the publication of the article and signed it for that express purpose, and thus became responsible for it (Strader v. Snyder, 67 Ill. 404; Prussing v. Jackson, 65 Ill. App. 324), and are not relieved from responsibility for the tortious act even if they can be said to have acted for or at the direction of the society. (Johnson v. Barber, 10 Ill. 425; Baird v. Shipman, 132 Id. 16.)

It is next contended that as appellee admitted taking the money, defendants published only the truth, and that that constituted a sufficient defense under the statute; but, in order to con-



stitute a sufficient defense, the truth must be published with good motives and for justifiable ends. The clear import of the publication was not merely that he took the money, which was not denied, but that he stole it and no good motives or justifiable ends are apparent from the publishing of the mere fact of taking the money. On the contrary, they were unworthy, the apparent purpose being to injure appellee's standing among those who knew him or might deal with him.

The admission of evidence<sup>is</sup> complained of. One of the witnesses, who read the article as published, had entrusted the plaintiff with the custody of some of his money, and, after reading the article, withdrew it, explaining his conduct by stating how he interpreted the article. It was competent to show the sense in which he understood it, (Nelson v. Borchgrevink, 52 Ill. 30) if it influenced his action to appellee's injury. The effect of the libelous words was the very essence of the injury.

Evidence was received of the pecuniary circumstances of two of the appellants. In a case where malice is shown, the jury may properly take such circumstances into consideration in assessing exemplary damages (Hintz v. Graupner, supra; Harbison v. Shook, 41 Ill. 141.) There would seem to be no ground for complaint, however, unless the verdict is excessive; but, in the absence of any evidence tending to excite passion and prejudice, the effect of such testimony can be remedied by a further remittitur, which, we think, should be made for reasons hereinafter stated.

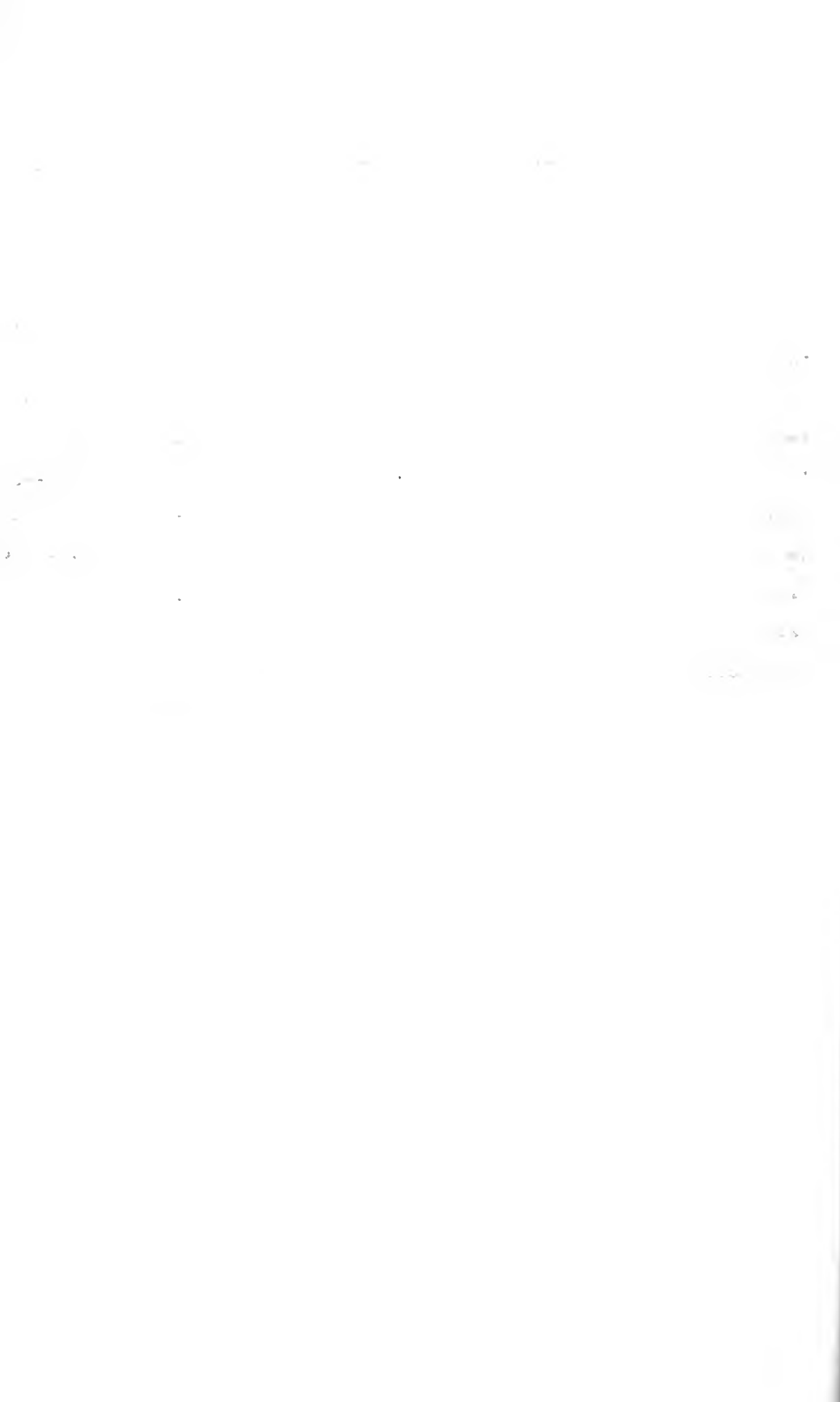
We hardly deem it necessary to discuss the other contentions made as to admission and exclusion of evidence or as to instructions given, for, after careful examination thereof, we find no serious error in any of the cited instances. The resolution of the society was properly limited to the question of malice, and its character was properly rejected as irrelevant, and there was no abuse of discretion in receiving the rebuttal evidence complained of.

... ..



But we think the judgment is still too large. We fail to find in the evidence satisfactory proof of special damages to the amount of the judgment, and even think it unjustified conceding the right to exemplary damages. Plaintiff claimed that he had a nail order business which was destroyed as the result of said publication. The evidence on that point is very unsatisfactory; but, giving due weight to all he can justly claim upon this record, we think a judgment of \$750 would cover all the special damage the evidence tends to show he sustained, and all that should be allowed, after including punitive damages, and as much as could reasonably be assessed against persons in appellants' circumstances. The judgment was excessive and will be reversed for that reason and the case remanded, unless appellees, within five days herefrom, files a remittitur for \$450, in which case the judgment will be affirmed for \$750 and costs.

AFFIRMED ON REMITTITUR.



WINFIELD & ELLIOTT PACKING CO.,  
Appellee,

vs.

G. H. CROSS,

Appellant.

Appeal from  
Superior Court,  
Cook County.

109 I.A. 410

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The only question raised on this appeal relates to the action of the court in striking the defendant's affidavit of merits from the files and entering judgment as of default against defendant for \$515 and costs, the amount claimed under the declaration, after deducting a balance not denied for which separate judgment was entered. The action was for money claimed to have been collected for plaintiff and withheld from it by the defendant. The affidavit of merits set up the nature of the defendant's defense in the following language:

"That on to-wit, Aug. 3, 1912, this defendant advanced to one H. H. Elliott, the promoter of said corporation and one of the organizers and original stock subscribers thereof the sum of Five Hundred (\$500.00) Dollars, which said sum is evidenced by one certain judgment note executed by H. H. Elliott, copy of which is hereto attached and which said sum so advanced by this defendant to said H. H. Elliott, was to be used in the building and construction of a certain building, to-wit, Shipping Station at Miami, Florida, and in and about the business of the said plaintiff then in the process of organization and which said sum so advanced to H. H. Elliott, this defendant is informed and believes the fact to be true was used in the construction of said building, to-wit: Shipping Station aforesaid, and which said building this defendant is informed and believes the fact to be true is now used by said plaintiff in and about the said business."

Appellant contends that the affidavit was sufficient to show plaintiff's ratification by acceptance of benefits of a contract entered into by Elliott as plaintiff's promoter or otherwise. It is enough to say that the affidavit does not set forth facts from which acceptance or plaintiff's knowledge of the transaction can be properly inferred, or such facts as constituted a

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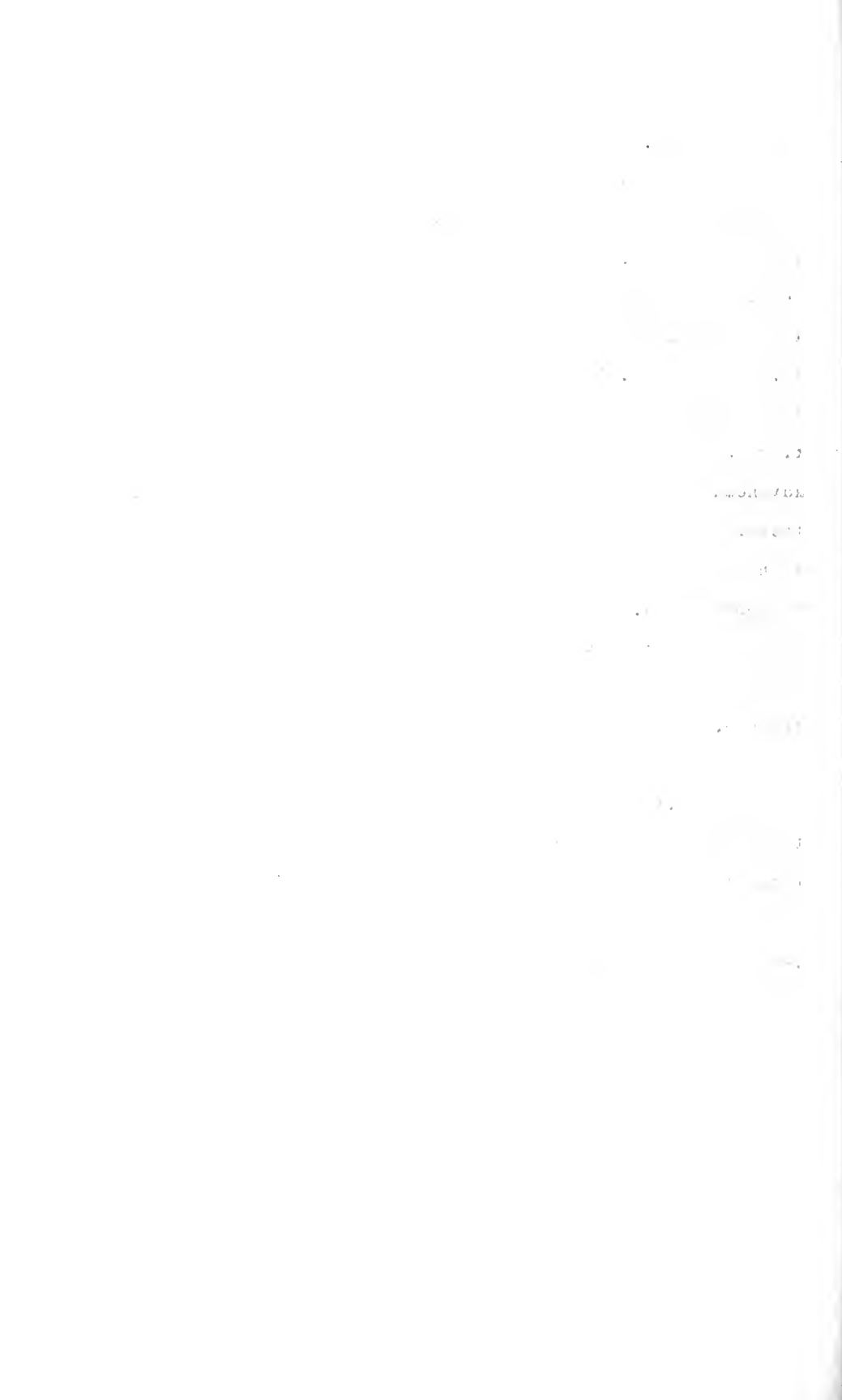
legal defense.

It was incumbent upon defendant to set forth such facts as the court could see constituted a meritorious defense. This was the rule even before Sec. 55 of the Practice Act was amended to require the defendant's affidavit of merits to specify the nature of the defense. (*Eberhart v. Page*, 89 Ill. 550; *Stuber v. Schack*, 82 id. 191; *Hays v. Loomis*, 84 id. 18.) But the affidavit in question alleges hardly anything more than that the plaintiff corporation used certain property for the construction of which defendant advanced money to a third party who might have been interested therein as a promoter or otherwise. In fact, its allegations as to such use are not inconsistent with its use under a contract of rental or otherwise. Manifestly the provision of the statute, requiring defendant's affidavit of merits in such a case to specify the nature of his defense, contemplates a statement of facts that show a legal defense.

The facts relied upon in the affidavit are too meagre and indefinite to warrant consideration of the arguments made as to the extent corporations may be held to liability for contracts entered into by the promoters or organizers thereof.

The action of the court was fully warranted and the judgment will be affirmed.

AFFIRMED.



For Entry, 1913, No.  
472 - 19822  
19582.

FULTON PACKING COMPANY,  
a corporation,

Appellant,

vs.

ANTON J. CERMAK et al.,  
Appellees.

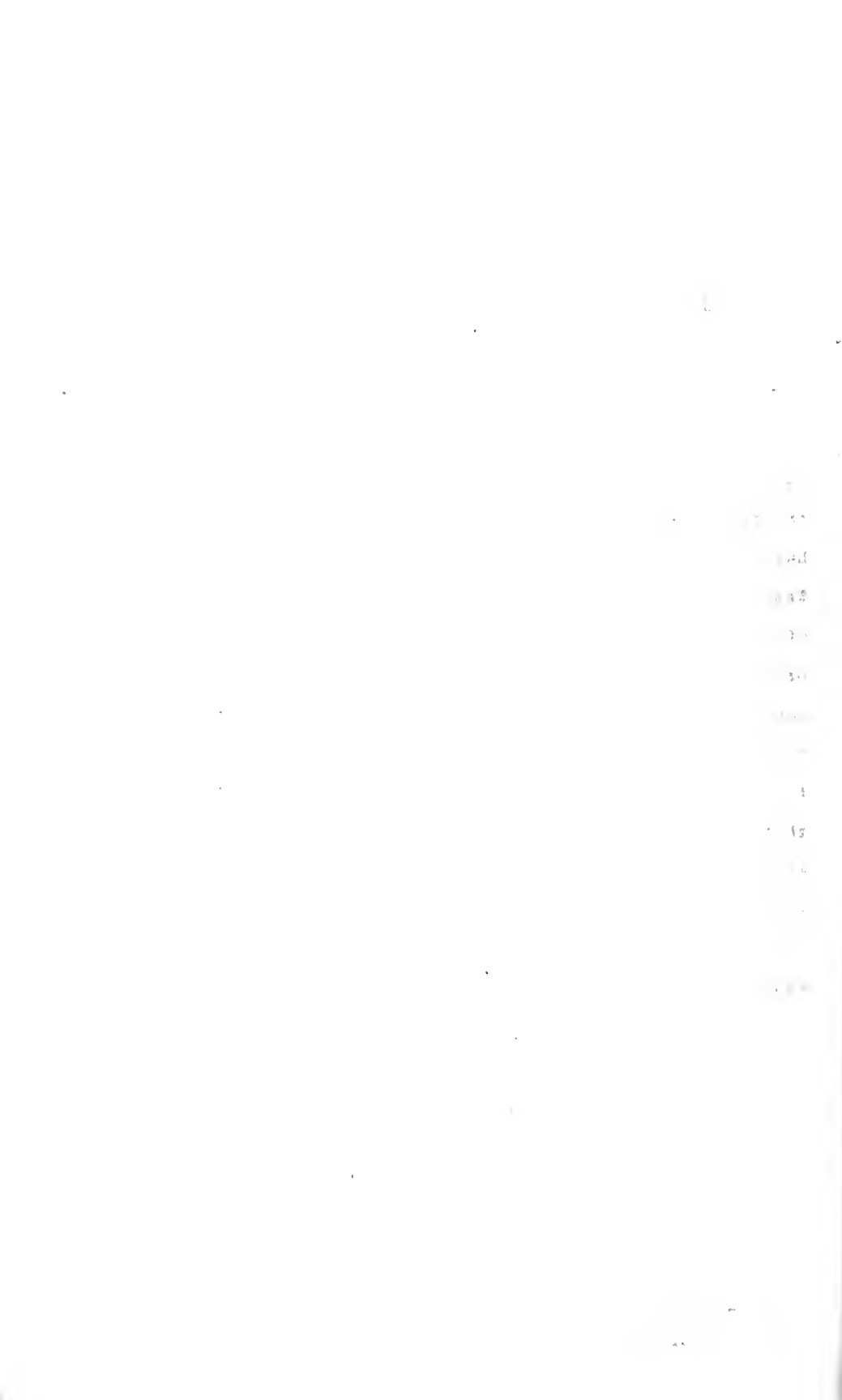
Appeal from  
Circuit Court,  
Cook County.

139 I.A. 112

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a replevin suit. On the day of the trial, an order of court was entered requiring plaintiff to produce at the trial certain books and documents pertinent to the issue. Later in the day the case came up for trial before another judge. When this order was brought to his attention by filing a copy thereof (which, of course, was unnecessary for that purpose), another order of the same purport was entered requiring plaintiff to produce some of the same books and documents at two o'clock of the same day, and the hearing was continued to that time to enable plaintiff to comply with the order. At that hour, plaintiff's counsel stated that he went to plaintiff's plant about a mile away; that the bookkeeper was out; that he and plaintiff's secretary made a search for the papers called for and were unable to find any books excepting a stub check-book then produced. No other explanation was given and no further time was asked for. The court then asked if the bookkeeper was present and counsel replied that he did not know but hardly thought so as the bookkeeper had gone out and left no word when he would return, but it does not appear that any effort had been made to secure his presence or assistance. No further information being vouchsafed as to plaintiff's willingness or readiness to comply with the orders, the court, on defendant's motion, discharged the jury, dismissed the case and ordered that a writ of retorno habendo issue for the property taken under the replevin writ. Under the circumstances, we think the court's action was

To move the judgment, the court...

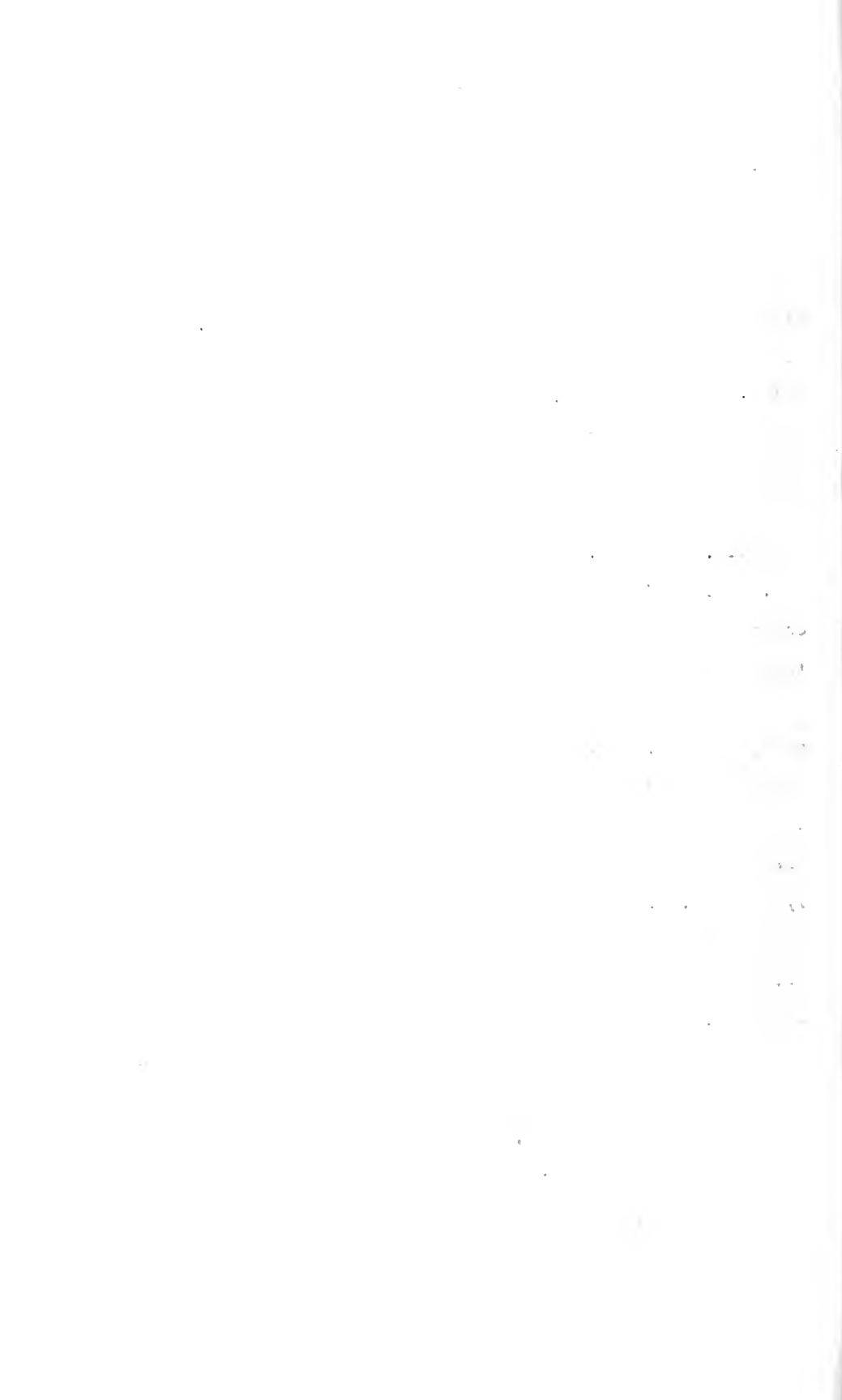




fully justified. The record discloses no satisfactory explanation of the failure to comply with either order, and no claim was made of want of sufficient time or opportunity to do so. The only contention argued is that the court had no jurisdiction to enter it. Of this there can be no doubt. The affidavits on which the orders were based showed that the books and documents called for were material to the issue. The court, therefore, under Sec. 9 of the Evidence Act, had the power to require their production, and disobedience of the order, without the showing of a reasonable effort or want of opportunity to comply therewith, justified dismissal of the suit. (14 Cyc. of Law and Procedure, 432; Sumner v. Sleeth, 87 Ill. 500.) The suit having been dismissed, it was proper for the court to order the return of the property taken on the replevin writ, the purpose of which fell with the suit.

Counsel for appellant cites *Walter Cabinet Co. v. Russell*, 280 Ill. 416. The case is not in point. There, after striking one party's pleading from the files for failure to comply with an order of court, judgment was entered in favor of the other for the full amount of his set-off, which the court held could not properly be done. In the case at bar, however, there was no judgment on the merits of the case, nor is it a bar to the institution of another suit to determine them. The judgment of the lower court will be affirmed.

AFFIRMED.



400 - 10898

19895

KENFIELD PUBLISHING COMPANY,  
a corporation,

Appellee,

vs.

EDWARD H. BAUMGARTNER,  
Appellant.

Appeal from  
Superior Court,  
Cook County.

189 I.A. 413

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

By agreement this case was referred to a referee to take testimony and report his conclusions of law and fact. Errors and cross-errors are assigned to the court's findings based thereon.

The primary question involved is whether appellant is liable to appellee for the expenses incident to the printing and publishing of certain numbers of a monthly journal, called "The Motor Way," for the months of April to October, 1907, inclusive. The report of the referee was adopted by the court so far as it found defendant liable for the expenses incurred up to and including September 6, 1907, when defendant ceased to do anything further in the way of publishing said journal. The cross-errors relate to the failure of the court to find defendant liable for expenses of printing, etc., incurred after said date.

"The Motor Way" was owned by the Technical Press of America, a corporation, of which one Albert T. Leach was a stockholder. My written agreement made March 27, 1907, between said corporation and Leach of one part, and Baumgartner of the other, the latter agreed, among other things, to continue the publication and distribution of "The Motor Way" for five years at his own expense. Prior to that time said journal was printed by plaintiff for said Technical Press. Plaintiff continued to print the subsequent issues here involved, and this suit was brought to recover

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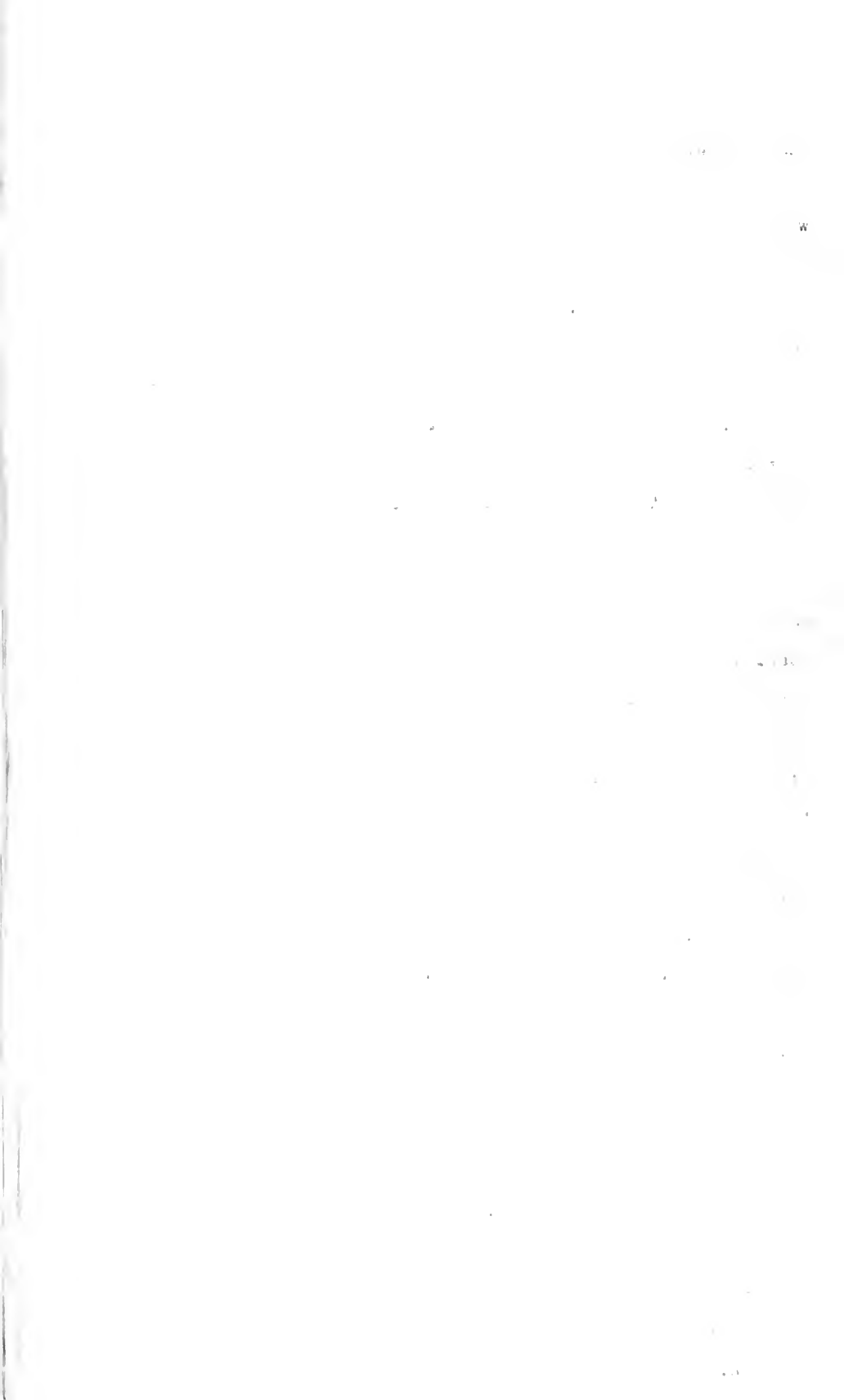
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the charges and expenses incident thereto.

The declaration contains the common counts only, to which there was a plea of general issue and a special plea charging that defendant was induced to enter into the contract by fraudulent representations. There can be no question that proof under the special plea was properly excluded as inadmissible in a suit on an instrument under seal (Jackson v. Security Life Ins. Co., 333 Ill. 181), and appellant does not undertake to urge the contrary. The only questions argued by him relate to the admission of evidence and the right to recover under the common counts.

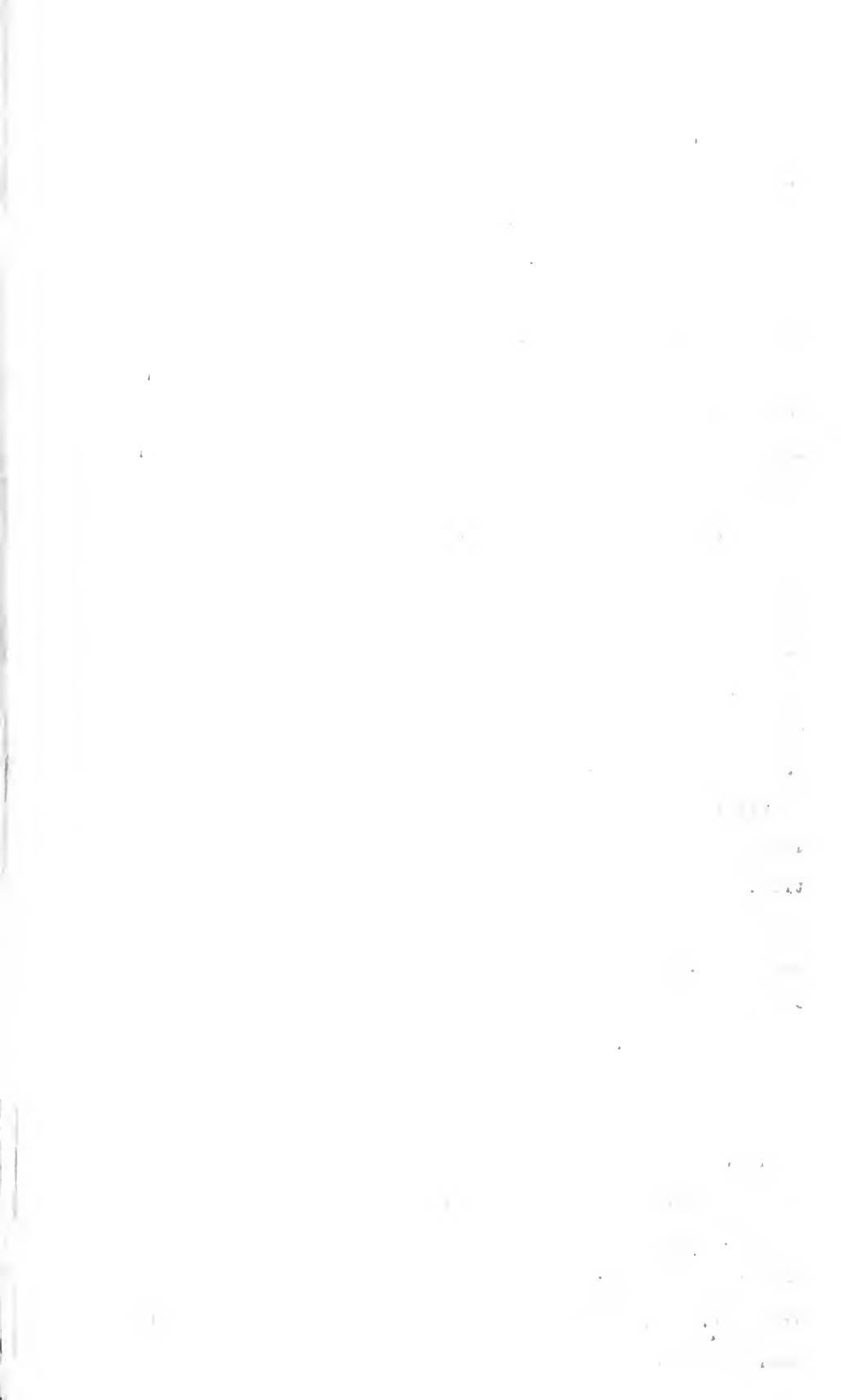
Leach was the secretary and treasurer of the plaintiff and testified that defendant requested plaintiff to print the April issue and said he would assume payment of the bills and responsibility for the publication, and that thereupon plaintiff agreed to do the printing for him; that he subsequently promised payment on account and transferred to plaintiff certain notes to be applied thereon. In a letter, dated July 11, 1907, replying to a letter from plaintiff saying it had ceased work on the publication of the July number, defendant, claiming its action was unwarranted, said, "you (plaintiff) were directed by us to issue the number." In another letter written in September, after abandonment of his contract, he plainly recognized his liability for the account with plaintiff "for printing, paper, etc., incurred within the last four or five months." This evidence was sufficient, unless overcome, and we do not think it was, to warrant judgment under the quantum meruit count for such expenses up to and including September 8th when defendant gave notice of his abandonment of the contract.

It appears that at the first hearing before the referee appellant's counsel admitted the amount of the account and afterwards asked, but was denied, leave to withdraw the admission. The question coming before the trial judge, on the



hearing of the referee's report, the withdrawal was permitted and the case re-referred for the sole purpose of determining the amount of the account. To prove it, plaintiff called its bookkeeper, who testified that a statement handed her was a true copy of the account between plaintiff and defendant from April 13, 1907, to January 6, 1908. Objection to the proof was overruled, and should have been sustained unless supplemented by competent evidence. Defendant expected, but, on cross-examination, examined the witness as to the entries in the books themselves, not questioning the amount of the account, but simply whether it was properly charged to defendant. From such cross-examination were brought out the facts that the charge for the April issue was made by a former bookkeeper to "Technical Press," and that the witness, who became the bookkeeper in May, put Baumgartner's name in parenthesis after the words "Technical Press" under instructions of Leach, as "the head of the house." Had there been no other proof of the amount of the account than the statement aforesaid, a different case would be presented. But defendant proceeded to examine said witness from the books of original entry, and job tickets and invoices from which the entries were made, thus clearly establishing, by his own examination, the amount of the account, to determine which was the sole purpose of the reference and which was in no wise disputed.

In appellant's original brief he contends that plaintiff's book of account was improperly received in evidence, whereas it was not even introduced in evidence, its contents having been brought out by his cross-examination. But, in his reply brief, he shifts his position and relies upon the claim that the entries therein were made against the "Technical Press" and not appellant, and thereby show the latter was not liable for the amount in controversy. Without discussing the character of the entries, which plaintiff may have been justified in charging to both appellant and





the "Technical Press," it is enough to say that, in our opinion, they do not impeach the independent evidence that defendant promised plaintiff to pay the account and recognized his liability therefor. If that be taken as true, then plaintiff impliedly consented to the charges on the books against him, at least up to September 6th.

Appellee's contention that defendant was liable to plaintiff for the expense of publication after September 6th, rests upon the theory that defendant's promise to Leach and the Technical Press in the contract between them to continue the publication and distribution of "The Motor Way" and bear the expense incident thereto, was a promise for plaintiff's benefit. The doctrine that a third party may maintain an action on a promise made by one person to another for his benefit, "is limited to contracts which have for their primary object and purpose the benefit of a third person and which were made for his direct benefit." (Spaulding v. City of Flora, 225 Ill. 157.) It was said of the contract under consideration in Redhouse v. Chi. & Alton Ry. Co., 219 Id. 596, where the same doctrine was invoked, "there is nothing in the contract which either directly or by necessary inference identifies plaintiff in error to be benefited by it." It was also said in General Electric Co. v. Sprague Electric Co., 130 Fed. Rep. 926, referring to this doctrine, that "it is an uncontroverted general principle that, to sustain an action at law upon a contract, privity of contract is necessary, and an indirect interest in the performance of an undertaking does not constitute such privity." Plaintiff was not a party to the contract here in question and was in no way referred to therein, and it is clear therefore that its terms were solely for the benefit of the parties thereto. There is nothing therein pointing to an understanding that plaintiff was to continue the work of printing the journal. Defendant was at liberty to employ any other concern he saw fit for that pur-



ness. Plaintiff had no interest in the performance of the contract unless it happened to be employed to do the printing. Its interest was wholly an indirect one. It would be a dangerous extension of the doctrine invoked to apply it to any stranger to a contract that might perform work contemplated by it regardless of the contract under which he actually performed the work. The court properly limited defendant's liability to the obligations arising under the agreement which the evidence tended to show he made directly with plaintiff. We find no reversible error in the record, and the judgment will be affirmed.

AFFIRMED.



V2.

JOHN RUS.

Amellant.

Appeal from  
Municipal Court  
of Chicago.

191A.416

Plaintiff in this case claimed damages on account of failure of defendant to comply with and complete the contract entered into between them for the erection of a building. The statement of claim set forth several defects in construction and the agreement of defendant to furnish the material and labor according to plans and specifications. Appellant's defense was that he performed the contract in a good and workmanlike manner according to the specifications and to the satisfaction of the architect; that certain changes in construction were made with knowledge and consent of plaintiff, and that plaintiff was not damaged, and claimed a set-off of \$175.

The case was tried before the court without a jury and judgment for \$475 was rendered in favor of plaintiff.

It is questionable whether any point assigned as error is duly preserved for review. The only one argued is that the evidence does not support the court's finding and judgment. It is perhaps enough to say that if we were to have our opinion upon the evidence so far as the record purports to set it forth, we would hold otherwise. But it is clearly apparent from the record that this court has not before it all of the evidence heard and acted upon by the trial court. It appears that with the consent of both parties the trial judge inspected the premises in question, and while the so-called 'statement of facts' certified to recited some

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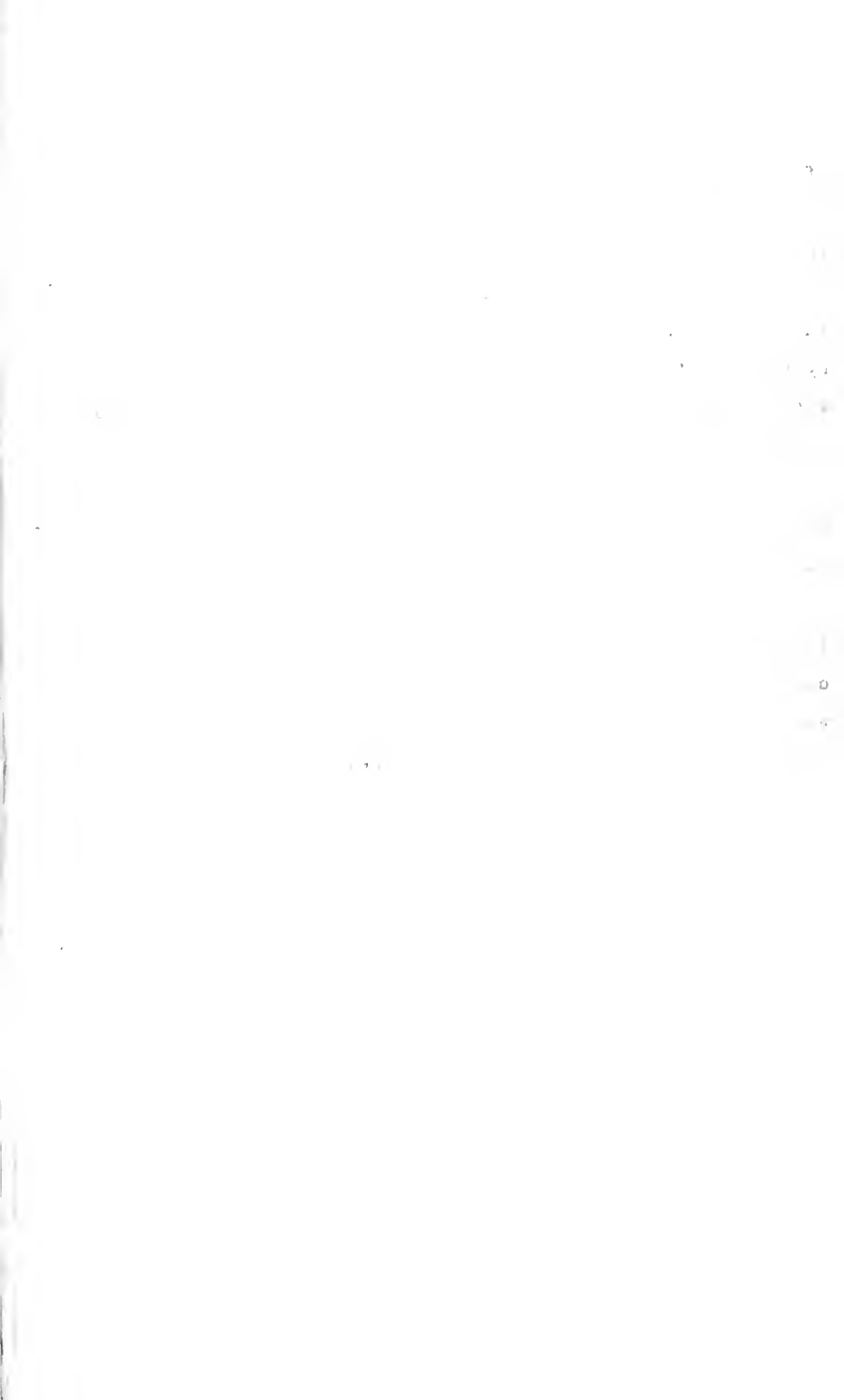
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of the things that were called to his attention, this court is unable to determine therefrom the actual conditions observed and taken into consideration from such inspection. Neither are the plans and specifications offered and received in evidence preserved in the record. Other evidence is also omitted therefrom as shown by the judge's certificate to the so-called 'statement of facts,' which states that it contains "all such facts as were necessary or material and all the evidence which was necessary and material for a proper review of the said case offered in the trial of said cause." Waiving consideration of the question as to whether or not this certificate or record is in form to warrant any review whatever of the proceedings had at the trial, nevertheless, it being evident that this court has not before it all of the evidence upon which the court below acted, the presumption obtains that the evidence omitted would support the judgment. (Lumbard v. Holdiman, 115 Ill. App. 458; Bulmer v. Worthing, 3 id. 460; Rockenfeller v. Tobias, id. 461.)

The judgment is affirmed.

AFFIRMED.





VIRGINIA DREYFUSE,  
Appellas,  
vs.  
WILLIAM FREUD et al.,  
Appellants.

Appeal from  
Circuit Court,  
Cook County.

189 I.A. 417

MR. FRANKLIN JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree declaring a pecuniary legacy to complainant (appellas) to be a lien on the testatrix's real estate, and allowing interest thereon.

Appellants contend that the intention of testatrix to charge her real estate with the payment of this legacy is not expressly declared by the will, and that as the personal property, shown by the inventory, was not sufficient to pay the debts, costs and expenses of the administration and said legacy of \$20,000, the legacy abated. They invoke the general rule stated in Hoslon v. Catton, 71 Ill. 526, that debts and pecuniary legacies bequeathed by the will are to be paid from the personal property and, in case of deficiency thereof, the legacies must abate unless the real estate is charged with their payment. As there stated, however, "the charge upon real estate may be made by testator, either by express directions to that effect contained in the will, or the intention thus to charge it may be implied from the whole will taken together."

In the first clause of the will in question the testatrix directs that her debts shall be paid "out of the proceeds of my estate \* \* \* hereinafter named," which is thereafter referred to in the clause making the bequest, reading as follows:

"Third: I give, devise and bequeath to my children, William Freud, Mrs. Bertha Lapiner, the wife of Alvin E. Lapiner, Joseph Freud and Bessie Freud, in equal parts, all my estate, both real and personal, that I may die seized and possessed of at the time of my death, less the sum of two thousand dollars



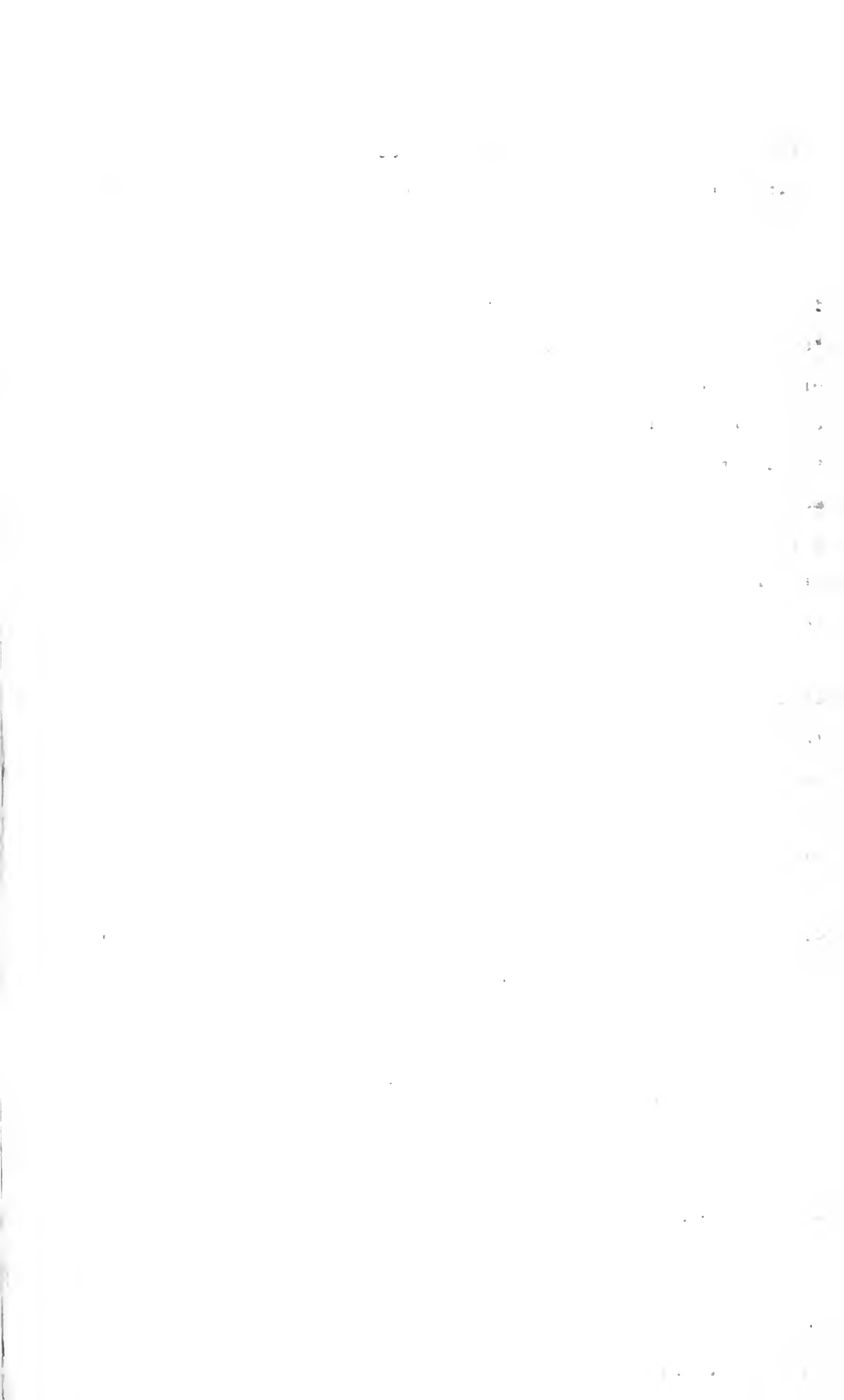
(\$2,000), which I hereby give and bequeath to my sister Miss Virginia Dreyfuss, which said sum of \$2,000 shall be deducted first out of my estate and the residue shall be divided in equal parts between my children above named, share and share alike."

We find no difficulty in determining the testatrix's intention from the language used. She gives her entire estate, "both real and personal," etc., to her children, but "less the sum of two thousand dollars (\$2,000)" bequeathed to complainant, which she expressly directs shall be deducted "first out of my estate and the residue shall be divided in equal parts between my children above named." That it was the intent of the testatrix to charge her real estate as well as her personal property with the payment of said legacy hardly admits of argument. That she might do so is not a debatable question.

At the time of the trial, defendants offered to prove that at the time of the execution of the will "and for a long time thereafter," the testatrix was the owner of personal property in excess of the amount necessary to pay her debts and said legacy, claiming that the court should read the will in the light of the extrinsic circumstances existing when the will was made. But such proof is resorted to only when the intention of the testator is not clear, and in the case at bar, it can hardly be questioned. The offer was properly rejected.

The residue was what was left of the real and personal property after payment of testatrix's debts and said legacy, and where, as here, the real and personal estate are, after making the legacy, given in one mass, the legacy is deemed a charge on the real as well as personal property. (Stickel v. Crane, 189 Ill. 211; Williams v. Williams, 10. 500.)

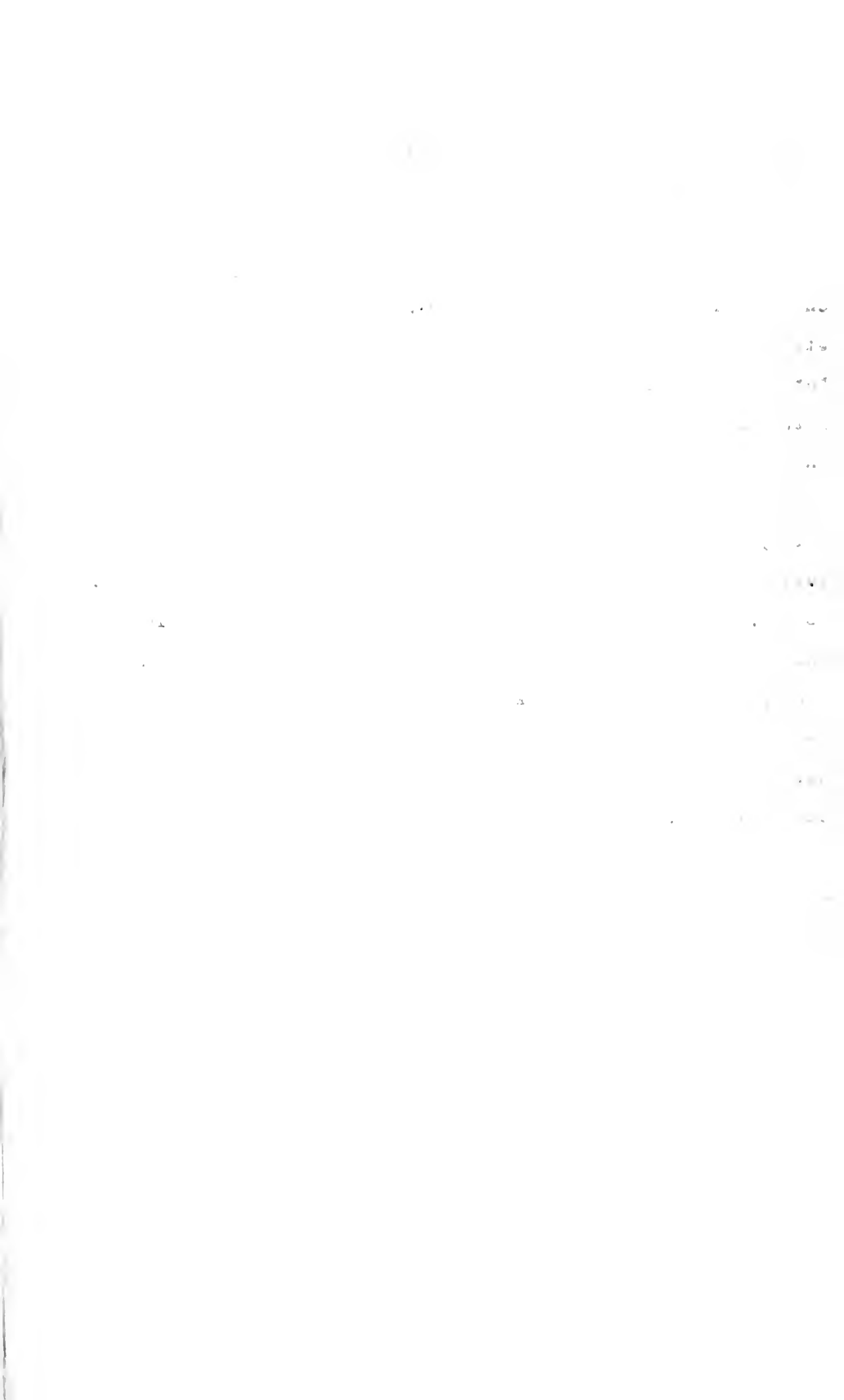
The real estate in question consisted of a city lot with a three-story flat building thereon. The decree appealed from gave complainant a lien on said premises to the amount of said legacy with interest thereon from February 17, 1918, being one year



after the issuance of letters testamentary, and directed the sale of the premises unless defendants, within a specified time, paid said sum with interest thereon. We do not deem it necessary to discuss at length the principles upon which the right to interest on general pecuniary legacies rests. It is not governed by our statute unless a will is intended to be included in the words "other instrument of writing" found in Section 2 of the Interest Act. It is a common law rule, followed in most states of the Union, where the subject is not affected by statute, that general pecuniary legacies draw interest from the time they are due and payable, which, when not fixed by the terms of the will, is under the general rule regarded as one year after the testator's death. (40 Cyc. pp. 2093-4.) No time for payment of the legacy was fixed in the will and the personal estate was insufficient to pay the legacy. Appellants, unquestionably, took the real estate burdened therewith, and we are not persuaded against the authorities in other jurisdictions holding the residuary legatee in such a case liable for interest on the legacy. The decree will be affirmed.

We are not disposed to regard the appeal as having been taken for delay and add statutory damages as requested by appellants.

AFFIRMED.



19947

In re Petition of LOUIS GREENBERG, )  
Appellant, )

vs. )

MINNIE V. CONNOR, )  
Appellee. )

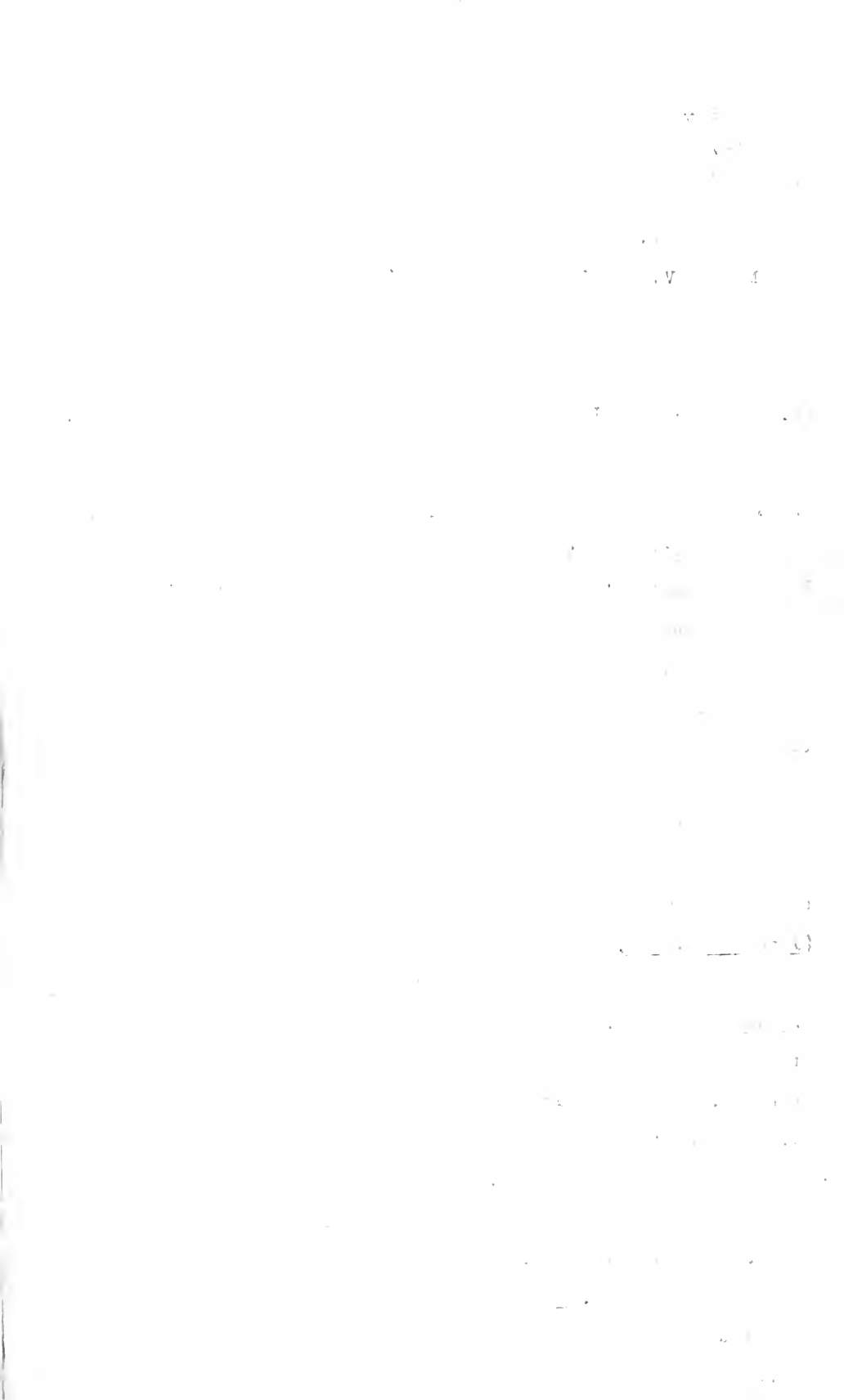
Appeal from  
County Court,  
Cook County.

189 I.A. 419

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant being held by a causae ad satisfaciendum issued on a judgment entered against him in the Circuit Court, filed a petition in the County Court for a discharge under the Insolvent Debtors' Act. The only question presented in the record is whether the County Court was justified in finding from the record of the Circuit Court case received in evidence, that malice was the gist of the action charged in all the counts of the declaration filed in the suit in which the causae was issued. The question arises only as to one count of said declaration and does not seem to be disputed as to the others.

Whether malice is the gist of a civil action may be determined alone from an inspection of the record of that action, (Jernberg v. Mix, 126 Ill. 234; Bisbal v. Kuttbauer, 147 Ill. App. 827) particularly from the allegations of the declaration (People v. Healy, 126 Ill. 3-14). The count in question charges, among other things, that the petitioner, with force and arms, etc., broke open the outer doors of the judgment creditor's dwelling-house and continued to make a great noise and disturbance therein for the space of three days. There could be no justification of these acts even under the execution under which he claimed to have acted. The breaking of the outer doors made him a trespasser ab initio (Snydacker v. Brosse, 51 Ill. 357.) Such conduct could not be deemed otherwise than intentional and actuated by improper motives and was unquestionably wrong. All the elements of malice,





therefore, as the term is used in the Insolvent Debtors' Act, appeared from such allegations, (Jernberg v. Hix, supra; Kitson v. Farrell, 108 Ill. 357) and the judgment against petitioner in said suit was, under the doctrine of res judicata, conclusive of that question, and estopped petitioner from showing the contrary. True, where there are several counts in the declaration and malice is the gist of some but not of others, the question under which count the verdict was rendered may be determined by extrinsic evidence, but no such rule obtains where, as here, each count charges malice, and the judgment necessarily involves the determination of that question as one of the issues. The court did not err in excluding the offer of extrinsic evidence and in holding that it had no jurisdiction. The judgment will be affirmed.

AFFIRMED.



HERBERT M. SEARS, Trustee,  
Appellee.

vs.

JOHN C. CURTIS,  
Appellant.

Appeal from  
County Court,  
Cook County.

189 I.A. 120

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 2, 1913, a judgment by confession was entered in the County Court of Cook County for \$170, upon a warrant of attorney contained in a lease, in favor of Herbert M. Sears, Trustee, plaintiff, and against John C. Curtis, defendant. Subsequently the defendant presented a written motion that the judgment be opened so as to allow him to plead and that the cause be heard upon the merits, upon condition that the judgment stand as security for such amount, if any, as might be adjudged upon such hearing to be due plaintiff from defendant. The motion was supported by the affidavit of defendant, a resident of the city of Chicago. The affidavit, however, was subscribed and sworn to before Eben Lesh, a notary public in and for Huntington County, Indiana, and his signature and official seal were affixed to the document. Also attached thereto were the respective certificates of the Clerk and Judge of the Huntington Circuit Court to the effect that said Eben Lesh was a notary public duly qualified and authorized under the laws of the state of Indiana to act as such in said Huntington County. The notary did not himself certify that he was authorized to administer oaths in said Huntington County. The bill of exceptions discloses that upon the hearing of said motion both parties were present by their respective attorneys, that said motion and affidavit were read and considered by the court, that arguments were had, that the court took the



matter under advisement, and that on May 16, 1913, the court entered an order denying the motion, from which order this appeal is prosecuted. It does not appear that upon said hearing plaintiff questioned the validity of said affidavit because of the lack of any certificate that said notary was authorized to administer oaths in said Huntington County.

The judgment was rendered for the sum of \$140 for rent alleged to be due for the month of April, 1913, for certain rooms in the Old Colony building, in Chicago, Illinois, and for \$30 attorney's fees. From the lease, which was filed with the narr. and cognovit, it appears <sup>Ex</sup> that the same was executed on April 15, 1912, and by its terms plaintiff leased the premises to defendant for the term of three years, from May 1, 1912, to April 30, 1916, and defendant covenanted to pay plaintiff, as monthly rent, the sum of \$140 until April 30, 1914, and \$150 per month thereafter, payable in advance on the first day of every calendar month during said term, and that he would not assign the lease, or let or underlet the premises, without the written consent of the lessor. The lease contained a clause whereby the defendant authorized any attorney of any court of record, on default of any of the covenants of the lease, to confess judgment from time to time in any actions brought by the lessor for any rent which might be then due by the terms of the lease, including \$30 attorney's fees in each case. On the back of the lease as filed was an indorsement, under the hand and seal of defendant, to the effect that the defendant, as lessee, assigned all his right and interest in and to the lease, from and after May 1, 1913, "unto The Curtie Company, John C. Curtie, Trustee," and that in consideration of the consent to this assignment by the lessor he guaranteed the performance by said assignee of all the covenants on the part of the lessee mentioned in said lease. There was also an indorsement of the assignee, dated April 12, 1912, to the effect that said assignee assumed and agreed



to make all payments from and after May 1, 1912, and to perform all the covenants and conditions of the lease by said lessee to be made and performed. There was also a third indorsement of the same date, signed and sealed by the plaintiff, as lessor, to the effect that he consented to the assignment of the lease to said assignee, "on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the lessee as therein mentioned, and that no further assignment of said lease or sub-letting of the premises \* \* \* shall be made without my written consent first had thereto."

In the affidavit of the defendant, filed in support of his motion that the judgment be opened, etc., it was stated, in substance, that said The Curtis Company was and is a co-partnership; that the company paid all rentals accruing under said lease up to August 1, 1912; that on or about that date the company informed plaintiff that they had abandoned the premises and desired to have the lease canceled; that plaintiff promised and agreed through said agents and representatives "to do all that could be done to re-rent said rooms and space"; that said company and affiant relied upon said promise and ceased to use said rooms in order that the same might be so re-let; that in violation of said agreement plaintiff made no attempt to re-let the premises but permitted the same to remain vacant until the fore part of the month of January, 1913, stating then for the first time that he would not show said rooms while there remained other unrented space in said building; that said rooms are desirable ones and could have been easily rented, and that the company would have been able to let or sub-let the rooms had they been allowed so to do, and the loss to them would have been comparatively small; that at the time of the execution of said lease and the assignment of the same affiant was the trustee and agent of said company; that

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it was agreed by and between plaintiff, affiant and said company that there should be no liability under said lease except against the trust funds of said company in the hands of affiant, as trustee; that pursuant to said agreement a rider was prepared by plaintiff's agents and representatives and attached to and made a part of said lease, said rider being made a part of the copy of said lease which was delivered to affiant, but which said rider is not attached to the copy of the lease filed with said narr. and cognovit, the same having been detached therefrom; that the word "trustee" used in said rider referred to this affiant as trustee for said Curtis Company; and that said rider so attached to said lease is as follows: "All persons or corporations extending credit to, contracting with or having any claim against the trustee shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damages, judgment or decree, or for any money that may otherwise become due or payable to them from the trustee, so that neither the trustee nor the shareholders, present or future, shall be personally liable therefor."

This affidavit of defendant stated facts which tended to show that after the Curtis Company had abandoned the premises the plaintiff made no efforts to re-rent the same to other parties, and thereby lessen the damages. It was the duty of plaintiff to exercise due diligence in re-renting the premises, and we think that under the showing made the court should have opened up the judgment. (McCormick v. Loomis, 185 Ill. App. 214, 216; West Side Auction Co. v. Connecticut M. L. Ins. Co., 186 Ill. 156.) Furthermore, the affidavit of defendant stated other facts which tended to show that defendant, trustee for the Curtis Company, was not individually liable to plaintiff in any amount.

Counsel for plaintiff urges the point for the first time in this court that defendant's affidavit is a nullity and should



not be considered, for the reason that it does not appear on the face of the affidavit that the notary public, Eben Lesh, was authorized to administer oaths. A sufficient answer to this is that the point was not raised in the court below, and on the hearing of the motion both parties and the court treated the affidavit as a valid one, and the court read and considered the affidavit. (Eberhard v. Foster, 165 Ill. App. 175, 176.)

The judgment of the County Court in refusing to open the confessed judgment is reversed, and the cause is remanded with directions to open said judgment and to permit the defendant, John C. Curtie, to make his defense to plaintiff's suit.

REVERSED AND REMANDED WITH DIRECTIONS.



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44.

CARTER H. HARRISON et al.,  
Appellante.

Appeal from  
Superior Court,  
Cook County.

189 I.A. 424

It was admitted in the answer of the respondents that certain ordinances set forth in the petition were and had been for some years past in full force and effect in said city, and were all of the ordinances which applied to and governed the issuance of dram-shop licenses. <sup>by, and</sup> It is provided in said ordinances, inter alia, that "the mayor shall grant a license for the keeping of a saloon or dramshop within the city to any person who shall apply to him in writing therefor, and who shall furnish satisfactory evidence of good character." It was further admitted in said answer that petitioner had been a resident of said city and engaged in the saloon business for 15 years, was a person of good moral character, had previously had licenses to keep a dram-shop in said



city issued to him from time to time, had never violated any of the statutes of the State of Illinois or the ordinances of said city relating to dram-shops, and had, on March 18, 1913, made application in proper form for a dram-shop license beginning May 1, 1913, for said premises, No. 113 East 25th street, had given the required bonds and had deposited with the city collector the license fee.

The petition alleged that the premises were not located in a residence neighborhood; and it was admitted in the answer that the premises were suitable in every way for a dram-shop, except that the same were in a residential district. The petition further alleged that petitioner had presented with his application for the license a petition signed by a majority of the citizens and legal voters residing within a radius of one-quarter of a mile of the premises, praying that said license be granted; that the captain of police of the district in which said premises were located made a written report to the effect that the same were in a residence district and recommended that the license be not granted; that said Carter H. Harrison, as mayor of said city, and said city clerk and said city collector, refused to issue the license; that "said refusal is based wholly and solely upon the false and fraudulent claim of said officials that said premises \* \* are located in a residence neighborhood, and that, therefore, said premises were not a proper place for the conduct of a saloon in said city." The answer alleged that there were on file in the office of the mayor the signatures of twenty residents of said city, residing on 25th street between Michigan avenue and Indiana avenue, protesting against the issuance of the license, each protest stating that the premises were in a residence neighborhood, and that upon investigation the said Carter H. Harrison, as mayor, found the fact to be that said premises were in a residential district and that the conducting and maintenance of a dram-shop in said premises would be a





nuisance and a detriment to the people of the district.

On the trial, by stipulation, a map was introduced in evidence showing the nature and use of the buildings in the vicinity of the proposed location of the dram-shop. The testimony of certain witnesses was also heard. It appears that East 25th street runs east and west; that No. 113 East 25th street is on the south side of the street between South Michigan and Indiana avenues; that South Wabash avenue is next west of South Michigan avenue, and that all three of said avenues run north and south; that immediately west of said proposed location is a four-story building opening on South Michigan avenue; that on the opposite side of East 25th street and extending from South Michigan avenue east to an alley running north and south and being half way between said avenue and Indiana avenue, is another four-story building also opening on South Michigan avenue, and that both of said buildings are occupied as auto-repair shops; that immediately east of said proposed location and between it and said alley is a building occupied as a store and also as a residence; that immediately east of said alley and on the south side of East 25th street are three buildings occupied by families for residences, and further east on the corner of the street and Indiana avenue is another building occupied as a residence; that immediately east of said alley, on the north side of said street, are three flat buildings, of 24 flats, occupied by families having children; that on the northwest corner of said street and Indiana avenue is another flat building of 24 flats, having three entrances on said street, occupied by families as residences; that the buildings on both sides of South Michigan avenue, between East 24th and East 26th streets, with the exception of two churches, a club building and a few residence buildings, are devoted to business purposes; that the buildings on both sides of Indiana avenue, between said streets, are, with a few exceptions, occupied as residences; that there is a saloon on



the southeast corner of East 24th street and Indiana avenue, another saloon on the northeast corner of East 26th street and said avenue, another on the southwest corner of said streets, also another saloon on the southwest corner of South Wabash avenue and East 25th street, and another on the west side of said avenue and a short distance north of said street; and that all of these saloons have been in said locations for several years.

Over the objection of counsel for defendants, the petitioner was permitted to offer evidence tending to show that the proposed location of said dram-shop was not in a neighborhood any more residential than those neighborhoods where said saloons are now located. Over objection, evidence was also offered by petitioner tending to show the character of the neighborhoods in the vicinity of other licensed dram-shops in other parts of the city.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It was alleged in the petition for the writ, in substance, that the refusal of the mayor to issue the license was based solely upon the false and fraudulent claims that the proposed location of the dram-shop was in a residential neighborhood and not a proper place for the conducting of a dram-shop. Counsel for petitioner, in his brief filed in this court, states: "I do not understand it was claimed in the court below that there was any fraud practiced in the refusal to issue the license in question; the contention was that the mayor unreasonably, capriciously and arbitrarily discriminated against the petitioner in refusing to issue this license."

Counsel for defendants here contend that the trial court erred in awarding the writ of mandamus for the reasons that the issuance of the dram-shop license was discretionary with the mayor,



and the evidence does not disclose that he was guilty of an arbitrary abuse of that discretion.

In Swift v. People, 63 Ill. App. 453, 461, it is said: "A court should not, by mandamus, compel the public officials to issue a license for the keeping of a saloon in a residence neighborhood, where a saloon will be a nuisance." In the same case it is said: "Whether a thing is or is not, at a particular place, a nuisance, is ordinarily a question of fact, and largely a matter of opinion." In Harrison v. People, 222 Ill. 150, 153, it is said: "The authorities authorized to grant the license cannot arbitrarily refuse the same, nor discriminate between persons, places and regulations pertaining to the business, without reasonable grounds therefor. (Zanone v. Mound City, 103 Ill. 352.) We are, however, of the opinion that there is vested in such authorities, unless expressly restricted by the language of the ordinance, a discretionary power, which may be reasonably exercised in the granting or refusing to issue a license. \* \* The authorities from other states fully sustain this reasonable construction. In many of these cases the language of the law or ordinance authorizing the granting of the license is, that upon the doing of certain things the licensing officer or body shall grant the license; but the decisions are to the effect that nevertheless a discretion exists in such officer or body, and that they will not be compelled to issue a license when in their discretion, reasonably and fairly exercised, the license has been refused."

Under the facts of this case we have reached the conclusion that there was not such an abuse of discretion on the part of the mayor in refusing said license as warranted the trial court in issuing the writ. We do not think that the evidence shows that he acted arbitrarily, or was controlled by passion or prejudice, in the exercise of the discretion vested in him, but on the contrary was actuated by the conviction that the best interests of the pec-



ple in the particular neighborhood demanded that the license applied for be denied. (Dunne v. Kretzmann, 130 Ill. App. 469; Kretzmann v. Dunne, 236 Ill. 31.)

The judgment of the Superior Court will be reversed and the cause remanded with directions to dismiss the petition.

JUDGMENT REVERSED WITH DIRECTIONS.





OLAF EGELAND, A. V. RAKOWSKI  
and GUSTAF GUSTAFSSON, Trustees,  
Appellees,

vs.

CHRISTIAN SCHEFFLER and LOUISE  
SCHEFFLER,  
Appellants.

Appeal from  
Superior Court,  
Cook County.

189 I.A. 426

STATEMENT OF THE CASE. This is an appeal from a decree of foreclosure of a trust deed, entered by the Superior Court of Cook County on April 2, 1913, in which the court approved the master's report, found that all the material allegations of the bill as amended had been proved, dismissed the cross-bill of the defendants, Christian Scheffler and Louise Scheffler, for want of equity, and adjudged that, unless said defendants pay to Olaf Egeland within two days the sum of \$282.83, with interest from February 3, 1913, together with a solicitor's fee of \$100, and costs of suit, and the master's fees taxed at \$75, the premises in question, situate in Chicago and owned by said defendants, be sold at public auction for cash to the highest and best bidder, etc.

The facts of the case, as disclosed from the certificate of evidence accompanying the master's report contained in <sup>the</sup> transcript, are substantially as follows: The defendants, Christian Scheffler and Louise Scheffler, wife of Christian, owned a farm in the state of Michigan. Being desirous of exchanging this farm, which was unincumbered, for Chicago property, they acquainted Gustaf Gustafsson of Chicago of their desire by letter. Thereafter Gustafsson met A. V. Rakowski, also of Chicago. Rakowski said he knew of a certain party, Martin Janca, who might exchange his Chicago property for the farm but that he would have to make a trip to Michigan and examine the farm. It was thereupon agreed between



Rakowski and Gustafson that they would both go to Michigan and see the Schefflers and examine the farm, that Rakowski would act as broker for Janca and Gustafson as broker for the Schefflers, and that if an exchange of the properties was consummated they would divide equally all commissions received from their respective clients. At their interview with the Schefflers in Michigan it was agreed that Johanna Scheffler, a daughter of the Schefflers, should go to Chicago and examine for them the Janca property, that the farm should be valued at \$4500, that if the exchange was made Gustafson was to get a commission of 5 per cent. on that amount, or \$225, but that, as the Schefflers did not have much ready money, they would pay \$50 in cash and the balance, \$175, in monthly installments of \$25 until paid. Shortly after this interview, about March 23, 1912, Johanna Scheffler went to Chicago, viewed the Janca property, and employed an attorney, named Krumseig, to examine the title and represent the Schefflers in the transaction. It was found that the Janca property was incumbered by two trust deeds, one in favor of a certain Building Association and the other in favor of another party for the sum of \$600. Johanna Scheffler testified that Rakowski represented to her that the amount of the two incumbrances was about \$2000. Rakowski denied making such a representation to her or to the Schefflers, and testified that he did <sup>not</sup> know the exact amount of the debt due to the Building Association and that he told Miss Scheffler to obtain a statement thereof from said association. It appears that she went several times to the office of the association for such statement but, as she did not have a certain book, it was refused her. Whether afterwards, and before the consummation of the exchange of properties, she was advised of the amount due said association does not appear, but it does appear that at the time the deeds were passed the attorney, Krumseig, had in his possession a book of said association regarding said indebtedness. The deeds were passed in the office of Mr.

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Mack, attorney for Janca, in Chicago, about April 28, 1912. The Schefflers paid Janca \$100 and delivered to him their warranty deed conveying the Michigan farm, and Janca and wife delivered to the Schefflers their warranty deed of the Chicago property in question. It was stated in the latter deed that said conveyance was made "subject to an incumbrance secured by trust deed recorded \* \* as doc. No. 4330742" (the amount of the incumbrance was not stated); and "also subject to an incumbrance of \$600 secured by trust deed recorded \* \* as doc. No. 4343953." Christian and Louise Scheffler also paid Rakowski the sum of \$50, commissions on account, and they signed a judgment note payable to the order of "A. V. Rakowski and Gustaf Gustaffson" for the sum of \$175, payable \$25 on the first day of June, 1912, and \$25 on the first day of each month thereafter, with interest at 6 per cent. per annum, payable monthly on the whole amount of said principal sum remaining from time to time unpaid. The note provided that if any installment, either of principal or interest, should remain unpaid for 30 days after due, the principal sum or any unpaid balance thereof should, at the option of the legal holder, become immediately due and payable. It was stated in the note that the same was secured by trust deed on real estate in Cook County, Gustaf Gustaffson, trustee. On the same day the Schefflers executed and delivered their trust deed on the property in question to said trustee securing said note. Rakowski was named therein as successor in trust. The trust deed contained the usual covenants and provided for the recovery of a reasonable solicitor's fee in case of foreclosure proceedings. The said judgment note, as introduced in evidence, bore the following endorsement: "Chicago, May 29, 1912. For one dollar and other good and valuable considerations, the receipt of which we hereby acknowledge, we transfer, assign and set over the within note to Olaf Egeland, and guarantee the payment of same. (Signed) A. V. Rakowski. Gustaf Gustaffson." Neither the installment of \$25, due



June 1, 1912, nor that due July 1, 1912, having been paid, Egeland elected to declare the entire principal sum due and payable and, on July 8, 1912, filed his bill to foreclose said trust deed, in the usual form, making Christian and Louise Scheffler, Gustaffson, as trustees, and Rakowski, as successor in trust, parties defendant.<sup>11</sup> Subsequently the bill was dismissed as to said trustee and successor in trust, and they were made additional parties complainant to the bill. The Schefflers answered, and filed a cross-bill in which they alleged, inter alia, that they were induced to make the exchange of properties on the representation of Rakowski that said mortgage of the building association on the Janca property amounted to about \$1,400, whereas in fact it amounted to about \$1,800; that they relied upon said representation; that they executed said note for \$175 for brokers' services claimed to have been rendered by Rakowski and Gustaffson; that at the time of the consummation of the exchange neither of them was a licensed broker in Chicago and that, therefore, the note was without consideration and void; and that Olaf Egeland was not an innocent holder of said note, for value, before maturity, but on the contrary knew all about the conditions under which said note was executed and acquired the same with full knowledge. The cross-complainants prayed that the note and trust deed be surrendered and canceled. Rakowski appeared and he was made a party complainant to the bill in his individual capacity as well as successor in trust. Both Egeland and Rakowski filed answers to the cross-bill, denying the material allegations thereof, and the cause was referred to a master in chancery to take proofs and report his conclusions. Subsequently and without prejudice to the reference, the Schefflers filed an amendment to the cross-bill, in which they set forth an ordinance of the city of Chicago, whereby it is made unlawful for any person to engage in the business or act in the capacity of a broker, within said city, without first obtaining a license, and





in which they further alleged that at and prior to the consummation of said exchange of properties Rakowski and Guatafson, without the knowledge of the Schefflers, had an agreement to pool their commissions, and that, therefore, said note was void, and that Egeland knew of this fact before the note was assigned to him. The said ordinance of the city of Chicago, so pleaded, was not introduced in evidence before the master.

The master in his report, dated February 3, 1913, found that Egeland was the legal holder of said note and trust deed; that default had been made in the payment of the note and that Egeland was entitled to foreclose; that there was due Egeland the sum of \$282.63, besides costs and expenses; that \$100 is a customary and reasonable solicitor's fee; that Egeland was an innocent purchaser of said note for value before maturity and that said note was a legal obligation and that the Schefflers should pay the same. The master recommended that the prayer of complainant's bill should be granted and that the cross-bill of the Schefflers should be dismissed for want of equity.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

We have reached the conclusion that the decree of the Superior Court should be affirmed.

It is not shown by a preponderance of the evidence that Rakowski falsely represented to the Schefflers that the mortgage of the building association on the Janca property amounted to about \$1,400, or that the two mortgages on the property amounted to only \$2,000 or thereabouts. But even if Rakowski made such false representations, it was not shown that Rakowski knew that they were false, or that the Schefflers relied upon them. (Grier v. Futerbaugh, 108 Ill. 802; Gillespie v. Fulton Oil & Gas Co., 236 Ill. 198, 198.) The testimony shows that the Schefflers,



through Johanna Scheffler and their attorney, Krussseig, made an independent investigation and at the time the deeds were passed Krussseig had before him a book of said association concerning the indebtedness to it.

While it was shown that neither Rakowski or Gustaffson were license, real estate brokers in the city of Chicago at the time the exchange of properties was consummated, we do not think that under the facts and circumstances of this case this should prevent a foreclosure on the note, even as against the payee of the note. The ordinance of the city, making it unlawful for a person to act in the capacity of a broker in said city without a license, was not introduced in evidence, and the court will not take judicial notice of city ordinances. (Illinois Central R. Co. v. Ashline, 171 Ill. 313.) Furthermore, it appears that the contract of the Schefflers to pay Gustaffson a commission of \$325, \$50 in cash and a note for \$175, in case the exchange was consummated, was made in the State of Michigan.

And we do not think that the evidence shows that the Schefflers did not know of the agreement between Gustaffson and Rakowski to pool or divide the commissions received from their respective clients. The fact that at the time the deeds were passed they paid Rakowski \$50 in cash, and signed the note for \$175 payable to both Gustaffson and Rakowski, tends to show that they did have such knowledge.

Furthermore, we think that Egeland, the complainant, was clearly entitled to foreclose on the note. The evidence shows that he purchased the note from Gustaffson and Rakowski for value and in good faith. He testified that before he purchased the note, secured by the trust deed, he in company with Rakowski, called on the Schefflers in Chicago, and told them of his intention, that at that time they said nothing to him about having any defenses against the note, that Christian Scheffler said he would call at Egeland's



office the following week and make a payment thereon, and that at the time the bill was filed nothing had been paid on the note. Rakowski also testified that at said interview the Schefflers said nothing about having any defenses against the note. Egeland did what the law required him to do. While it is true that the Schefflers testified that at said interview they told Egeland that they had been cheated by Rakowski and that they would not pay the note until the matter was fixed up, the conclusion of the master, who was the witnesses, that Egeland took the note, after inquiry, without notice of any defenses, is entitled to great weight.

For the reasons indicated the decree of the Superior Court is affirmed.

AFFIRMED.



AVERY SCALE COMPANY,  
vs.  
GOTTFRIED BREWING COMPANY,  
Appellees,  
Appellant.

Appeal from  
Municipal Court  
of Chicago.

189 A. 430

STATEMENT OF THE CASE. This is a suit of the first class brought in the Municipal Court of Chicago by the Avery Scale Company, a Wisconsin corporation, plaintiff, against Gottfried Brewing Company, a corporation having its place of business in Chicago, Illinois, defendant, to recover the contract price of three automatic scales - a coal scale, a water scale and a grain scale - and certain other merchandise. The scales were delivered to defendant under three separate written contracts. In its affidavit of merits the defendant alleged, in substance, that none of said scales fulfilled the guarantees contained in said contracts, that none ever worked accurately, that numerous demands had been made on plaintiff to put them in proper working condition, that plaintiff had endeavored so to do but had failed, that the scales had been tendered back to plaintiff, and that defendant claimed no title thereto and had received no beneficial use thereof. The contract prices of the three scales aggregated the sum of \$1,721. The price of the other merchandise sold and delivered was \$70, which amount is not in dispute. The case was tried before the court without a jury, resulting in a finding in favor of plaintiff for the full amount of its claim, viz., \$1,791. The court overruled defendant's motion for a new trial and entered judgment on the finding, which judgment the defendant by this appeal seeks to reverse.

The contracts for the coal scale and the water scale were entered into on July 14, 1911, and the contract for the grain scale





on January 20, 1912. The coal scale was installed in defendant's plant about November 23, 1911, the water scale shortly thereafter, and the grain scale about February 20, 1912.

By the coal scale contract plaintiff agreed to build and ship to Chicago to defendant's order "one Avery Auto Coal Scale with power feeding device, capacity 100# per discharge, with travelling carriage, supporting framework and half horse power motor set up complete ready for operation. \* \* Discharge spout to be so arranged that it will telescope to enable you to weigh into hand trucks or ashes into a wagon. You to provide laborers assistance to help our expert to hoist the scale into position after track is erected." By the water scale contract plaintiff agreed to build and ship to defendant's order at Chicago "one #45 Size D Avery Automatic Water Weigher with a capacity of 200# per discharge and capable of weighing 24,000# of water per hour at a temperature of 220 F. and at a pressure not to exceed 125#. Scale to be completely enclosed and filled with bottom tank capable of holding 400# of water." By the grain scale contract plaintiff agreed to build and ship to defendant's order at Chicago "one Avery Automatic Elevator Scale, with capacity for 1,500 bushels per hour."

In all three contracts is contained a provision that "the legal title of the scale does not pass from the Avery Scale Company until they have received payment in full"; also a provision in substance the same as in the coal scale contract, as follows: "We (meaning plaintiff) guarantee our scale to work accurately and keep an accurate and complete record of the weight of the specified material passed through it when set up and operated according to our printed instructions. We further guarantee the machine against any breakage due to defective materials or workmanship, and will replace any defective parts free of charge, within one year from date of shipment, provided an inspection proves the claim." In the coal scale contract the word "accurate" is de-



defined to mean a "variation not to exceed  $\frac{1}{4}$  of 1%." In the water scale contract the word "accurately" is defined to mean a "variation not to exceed  $\frac{1}{4}$  of 1%," and <sup>in</sup> the grain scale contract a "variation not to exceed 1/8 of 1%."

In the coal and water scale contracts there is a clause as to a "free trial," wherein it is provided that plaintiff agrees to allow defendant a free trial of the scale for thirty days, said trial to begin within fifteen days after receipt of the machine, and that if during said trial the scale fails to fulfill the above guarantee defendant shall be at liberty to return the same to plaintiff, without liability to either party, after giving plaintiff a reasonable opportunity to inspect the same, and provided that notice of defendant's intention to return the scale, in the event of plaintiff's inability to make it conform to said guarantee, be given plaintiff within said trial period. The grain scale contract contains no provision for a free trial.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The principal error assigned and argued is that the finding is against the weight of the evidence.

Plaintiff's Wisconsin attorney, Mr. Louis G. Boehmrich, was plaintiff's main witness. He also acted as plaintiff's attorney upon the trial and examined and cross-examined certain witnesses. He testified that in May, 1910, at the request of plaintiff, he called on Mr. Carl M. Gottfried, secretary and superintendent of defendant, at defendant's plant in Chicago, and also interviewed defendant's engineer; that he presented a bill of plaintiff's account against defendant for the three scales and the merchandise and demanded payment of Mr. Gottfried; that the latter said that he had no objection to the amount of the bill, and that both Mr. Gottfried and the engineer said that the coal scale was all right.



Mr. Gottfried and the engineer denied making any such statements. Under the decisions of our Supreme Court but little weight should be given to the testimony of a witness who is also the acting attorney for one of the litigants. (Wilkinson v. People, 226 Ill. 135, 149; Grindle v. Grindle, 240 Ill. 143, 148; Setzel v. Firebaugh, 251 Ill. 190, 198.)

On behalf of the defendant Mr. Gottfried testified, in substance, that the coal and water scales, from the time they were first installed never worked properly or as guaranteed; that various representatives of plaintiff came to defendant's plant in the endeavor to make them work, but without success; that said scales are of no value; that right after the Christmas holidays in 1911 (which was within 45 days after said scales had been received), he told a representative of the plaintiff that said scales had proven unsatisfactory and that they had better be removed if they could not be made to work properly; that subsequent to this conversation plaintiff sent various men to defendant's plant in the endeavor to make said scales work properly, but without success; that in August, 1912, Mr. Bocharich made a second call on the witness; that it was then agreed that a further test of said scales should be made at a time to be fixed by plaintiff, but that no time for such test was ever fixed by plaintiff and that subsequently plaintiff commenced the present suit. The testimony of other witnesses for defendant tended to show that the coal scale could never be made to operate but a few hours without a break-down, that it would not weigh mine run coal or weigh the ashes that came from the grate, and that it was not as accurate as guaranteed and was of no value. The testimony of some of defendant's witnesses also tended to show that the water scale frequently failed to work, that it would not weigh water at a temperature of 210 degrees F., that the valves would not hold tight, that the machine was over-rated, that it did not work properly or as accurately as guaranteed, and that it was of no value. The testimony of Mr. Gottfried and



other of defendant's witnesses tended to show that the grain scale would not weigh 1,500 bushels per hour, was not as accurate as guaranteed, and was of no value to defendant.

Our conclusion is, after a careful review of all the evidence, including the testimony of certain witnesses for plaintiff in rebuttal, that the finding of the trial court is clearly against the weight of the evidence, and that the court erred in overruling defendant's motion for a new trial.

It is contended by counsel for plaintiff that, where the testimony is conflicting and the evidence of plaintiff is sufficient, when considered alone, to sustain the finding of the trial court in plaintiff's favor, this court is bound by such finding, even where the same appears to be against the weight of all the evidence. We do not understand this to be the law. (Bradley v. Palmer, 193 Ill. 16, 90; Donelson v. East St. Louis Ry. Co., 235 Ill. 525, 526.)

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.





SAMUEL GRUENBERGER,

Appellee,

vs.

CHICAGO CITY RAILWAY CO. et al.

On appeal of

CHICAGO RAILWAY CO.,

Appellant.

Appeal from  
Superior Court,  
Cook County.

109 I.A. 433

STATEMENT OF THE CASE. / On January 12, 1911, Samuel Gruenberger, plaintiff, commenced an action in the Superior Court of Cook County against the Chicago City Railway Company (hereinafter referred to as City Railway Co.) and the Chicago Railway Company (hereinafter referred to as Railway Co.), to recover damages for personal injuries. In his second amended declaration, which consisted of one count, plaintiff alleged, in substance, that on November 21, 1910, the City Railway Co. was possessed of and was operating an eastbound electric street car on Third Street, Chicago; that plaintiff was a passenger on said car; that certain servants of the City Railway Co. were driving said car in an easterly direction on Third Street, at or near the intersection of that street with Western Avenue; that the Railway Co. was possessed of and was operating another electric street car, running northward on said Western Avenue under the management of its servants; that while plaintiff with all one care was riding as such passenger on said eastbound car, the Railway Co. by its servants so carelessly and improperly drove and managed said northbound car, and the City Railway Co. by its servants so carelessly and improperly drove and managed said eastbound car, that, through the negligence of said defendants by their said servants, the said northbound car struck the said eastbound car with great force and violence and plaintiff was thereby thrown from the south side seats of said eastbound car



to the north side seats thereof; and that plaintiff was thereby severely and permanently injured. To this declaration each defendant filed a plea of the general issue. The jury by their verdict found the Railways Co. guilty and assessed plaintiff's damages at \$8,500, but they made no finding as to the City Railway Co. The court overruled the motion of the Railways Co. for a new trial and entered judgment on the verdict, to reverse which judgment the Railways Co. prayed and perfected this appeal.

/ The accident occurred about 11 o'clock on the evening of November 21, 1910. Plaintiff was about 23 years of age and was in the employ of the Western Electric Company as a clerk and time-keeper in one of its departments, receiving \$13.50 per week and also additional sums for overtime work. About 10:30 o'clock he boarded said eastbound 22nd street car at 47th and Ogden avenues and paid his fare. He was sitting on the south side of the car, next to the window, in the third or fourth seat from the rear end. As the car was crossing Western avenue the other car, approaching from the south on Western avenue, struck the 22nd street car in about its middle. Plaintiff did not see the Western avenue car as it approached. As a result of the collision he received a cut on the lower lip extending nearly to the chin, another cut on his upper lip, another cut about three inches long on the upper part of his right buttock, and three of his front lower teeth were knocked out. He was taken to a hospital where he stayed in bed for three weeks, then to his home where he remained three weeks. His wounds "healed up nicely," but the scars remained. He returned to the Western Electric Company, was put to work in the same department in which he was employed before the accident, remained there for a time, was then changed to another department, where he worked until March 16, 1911. Afterwards and before the trial he worked for other employers in various occupations. At the time of the trial, June, 1913, he had been working for the Manhattan Electric Company



for about three months, doing office work and receiving \$15 a week. He testified that when the weather was bad he suffered from pains in the back and buttock underneath the scar, but outside of this there was nothing the matter with him.

Plaintiff and two witnesses for him testified as to the happening of the accident. Neither of the defendants called any witnesses as to the accident. There was a variance between the testimony of plaintiff and one of his witnesses as to what occurred when the 22nd street car reached Western avenue. Plaintiff testified that said car stopped on the west side of the avenue "for a half a second or so, and the conductor gave a signal to go ahead and we crossed to about the middle of the crossing, and a Western avenue car hit us." Caroslav Tittelbach testified that he was sitting in the third or fourth seat from the front on the north side of said car with his friend Kyle, that the car did not stop at the Western avenue crossing, that the conductor gave the signal to run over the crossing, that the car "was not going slow," and that the 22nd street car was over the crossing and on the east side of Western avenue when it stopped. No witness testified as to what the conductor or motorman of the Western avenue car did in the management and operation of that car, nor concerning the movement of that car.

Over objection plaintiff was permitted to testify that as one of the results of the accident his memory became so affected that he was unable to perform his work for the Western Electric Company as well as formerly, for which reason he was discharged. The attorney for defendants moved that this testimony be stricken out on the ground that the allegations of the declaration were not sufficiently specific to warrant such testimony, but the motion was denied. At the conclusion of plaintiff's case, however, the court excluded the testimony and directed the jury to disregard the same.

Before plaintiff had rested his case, one of the attor-

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neys who appeared for the defendants stated in open court that he and the attorney for plaintiff had stipulated that the record might show that the car line on 22nd street was owned and operated by the City Railway Co.; that the car line on Western avenue was owned and operated by the Railways Co.; that the eastbound car on which plaintiff was riding on the night in question was a car of the City Railway Co., and that the car that ran into said eastbound car was a car of the Railways Co., northbound on Western avenue; and that said Western avenue car did not stop at the south intersection of 22nd street, but came right through and struck the eastbound car of the City Railway Co., which did stop on the west side of Western avenue and before crossing over. Thereupon the court said: "The stipulation amounts to this, that if anybody is liable it is the Chicago Railways Company," to which said attorney replied: "No, that is not the stipulation. I suppose we will let the jury pass on that. \* \* The only object of the stipulation is to explain how the collision took place, to save us calling the motorman, who is not now in the employ of the company, and it will be difficult to locate him. \* \* The stipulation is simply with a view of possibly enabling the jury to fix the liability where it belongs. \* \* If there is any liability here, it is agreed that the City Railway Company will look after it. There is an agreement of counsel as between the Chicago Railways Company and the Chicago City Railway Company, the two defendants in the case. That is the reason that the attorney for the Chicago Railways Company is not here." Thereupon the court said: "If the jury should arrive at a verdict there would be no objection to a verdict against both defendants," to which said attorney replied: "Yes, your Honor, I would like to have the jury fix the liability, if there is any, as to which company, if either, is liable for it, and let the verdict so read if they find a liability. I would like to have that determined in this case, because it would make some difference ac-





according to our agreement whether either or both are liable. The reason why we assume the defense in this case is because this man was our passenger. I so stated to the jury, but I guess the court did not hear it."

The defendants excepted to the giving of two instructions offered by plaintiff. Instruction No. 1 is as follows:

"1. The court instructs the jury that a common carrier is under obligation to exercise the highest diligence consistent with the practical operation of its road and consistent with the means of conveyance adopted by the carrier to prevent injuries to passengers from collision with cars of another road, and where passengers themselves are guilty of no negligence and are injured in consequence of such collision, a prima facie presumption of negligence on the part of the carrier arises. This presumption, however, may be overcome by competent evidence showing that the accident happened without the negligence of the carrier.

After counsel for the Railways Co. had filed their printed brief and argument in this court counsel for plaintiff filed a written motion, accompanied with written suggestions, that this appeal be dismissed, chiefly on the alleged ground that the Railways Co. had no interest in the litigation. To this motion counsel for the Railways Co. filed counter suggestions, and the motion was reserved to the hearing. Other than said written suggestions counsel for plaintiff filed no brief in reply to that of the Railways Co.



MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

As to the motion of plaintiff that the appeal be dismissed, we are of the opinion that the motion should be denied. We do not think that the statement made by the attorney for the defendants, above set forth, shows that the Railways Co. has no interest in this appeal, as argued by counsel for plaintiff in their written suggestions here filed.

Counsel for the Railways Co. urge five points as reasons for a reversal of the judgment. One of these points is that the giving of instruction No. 1, offered by plaintiff and above set forth, constituted error prejudicial to the defendant, Chicago Railways Company.

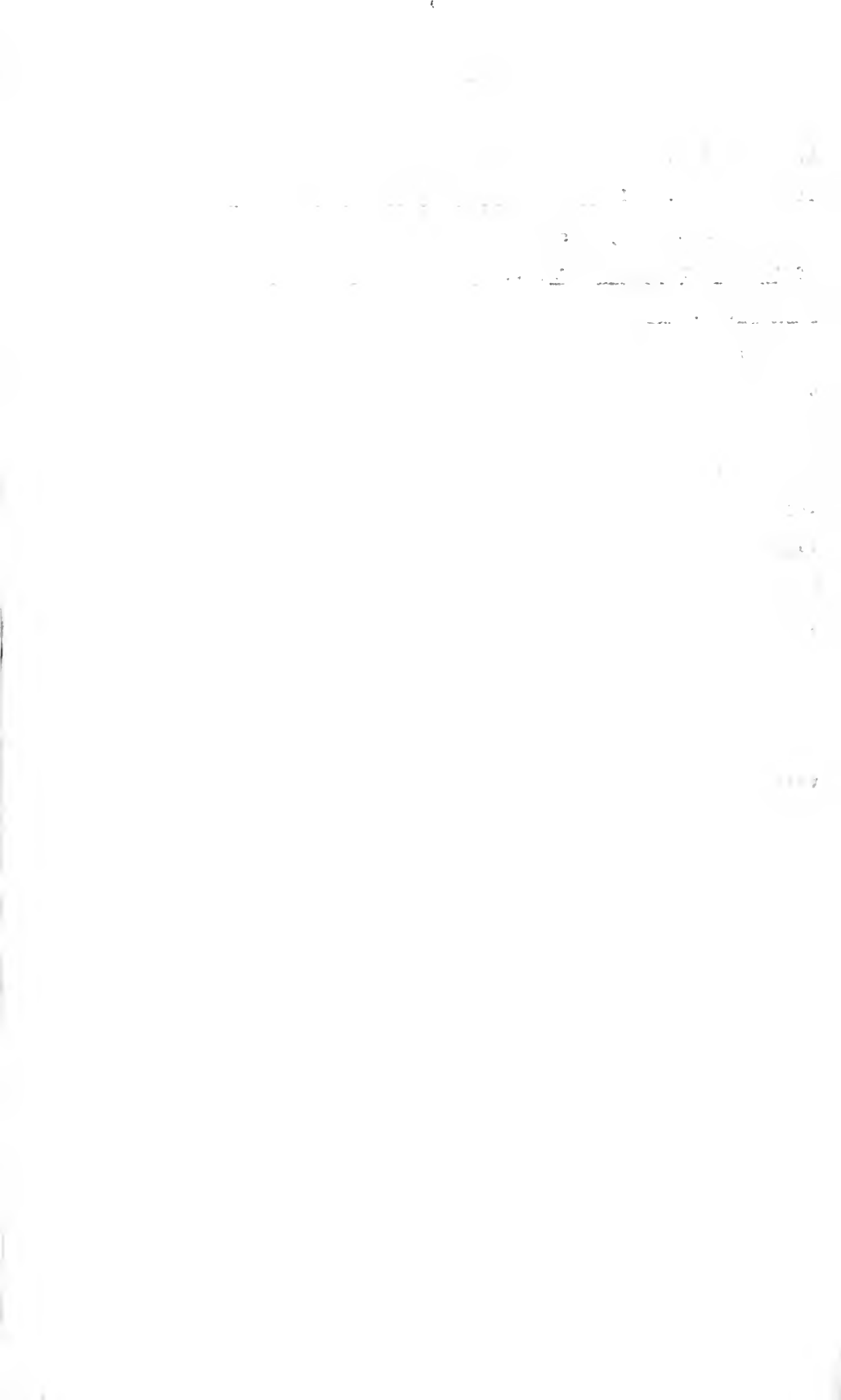
We are of the opinion that the giving of said instruction was such error as warrants a reversal. Plaintiff was a passenger on the car owned by the defendant, City Railway Co. Both defendants were common carriers. While the instruction correctly stated the law as to the defendant City Railway Co. (Grainke v. Chicago City Ry. Co., 234 Ill. 504; Elgin, etc., Traction Co. v. Wilson, 217 Ill. 47, 51), we think it was misleading and erroneous as to the defendant Chicago Railways Co., against which company alone the jury returned a verdict, in that it was calculated to give the jury the impression that proof by plaintiff of the fact of the collision, and that he was guilty of no negligence, made out a prima facie case of negligence on the part of the Chicago Railways Co., which it was bound to overcome by competent evidence showing that the accident happened without its negligence. It is quite evident that the jury were in fact misled, for the reason that beyond the proof that a collision occurred there was no testimony in respect to the management and operation of the car of the Railways Co., at and just prior to the collision, and, in our opinion, the statement of the attorney for the defendants, above mentioned, did not amount



to an admission of negligence on the part of the Railways Co. or its servants. In West Chicago Street Railroad Co. v. Martin, 154 Ill. 523, 528, our Supreme Court cited with approval the case of Central Passenger Co. v. Kuhn and Louisville & Nashville Railroad Co. v. Kuhn, 36 Ky. 578, and said that in that case "the plaintiff was a passenger on a street car, which, while passing a railroad crossing at night, was run into by a train and the plaintiff injured, and it was held that the burden of proof was on the street car company to show, if such was the case, that the injury did not result from its want of diligence but from the negligence of the railroad company, and that the burden was on the plaintiff to prove negligence on the part of the railroad company, if he desired to recover from each." In the present case plaintiff sought a recovery from both defendants.

The motion of appellee to dismiss the appeal is denied, and for the error in giving said instruction the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.



579 - 19884  
1978

JOHN F. DEVINE, Adm. of the Estate  
of Theodore Wallerstedt, deceased,  
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,  
Appellant.

)  
) Appeal from  
) Circuit Court,  
) Cook County.

189 I.A. 435

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff's intestate, Theodore Wallerstedt, a little boy, was struck by a northbound California avenue car, owned and operated by the defendant, Chicago Railways Company, about 20 feet north of the north cross-walk of Augusta street, on March 23, 1911, about three o'clock in the afternoon of that day. The deceased had been standing at the east curb of California avenue, north of said cross-walk, with two other little boys. The view of the approaching car was unobstructed. He advanced from the curb towards the east track, on which the northbound cars ran, and when about at the east rail of said track he was struck by said car and carried under the front trucks and killed.

Plaintiff's declaration consisted of three counts. The first count averred, in substance, that on said day plaintiff's intestate was a pedestrian on said California avenue, at or near its intersection with Augusta street, public highways in the city of Chicago, that while plaintiff's intestate was in the exercise of ordinary care for his own safety the defendant then and there caused one of its motor or electric cars to be so carelessly and negligently driven, propelled and managed that said car ran into and struck plaintiff's intestate, causing his death, and that he left him surviving certain heirs (naming them) who have sustained and will sustain great pecuniary loss by reason of his death. The second count is substantially the same as the first, except that the negligence charged is that defendant drove said car at a high





and excessive rate of speed. The third count is also substantially the same as the first, except that the negligence charged is that defendant caused no bell or warning of any kind to be rung or sounded. To this declaration the defendant filed a plea of the general issue.

A trial was had before a jury, resulting in a verdict finding the defendant guilty and assessing plaintiff's damages at \$3,000. Defendant's motion for a new trial was overruled and an exception taken, and judgment upon the verdict was entered against defendant.

The evidence was conflicting as to how far north of the cross-walk of Augusta street the deceased was when he left the curb and went towards the tracks, as to how far away the car then was, as to whether he walked or ran, as to the speed of the car, as to whether or not a bell or gong was rung, and as to how far the car ran after the deceased was struck. Inasmuch as we have reached the conclusion that the judgment must be reversed and the cause remanded for a new trial because of the error of the court in giving certain instructions, we shall make no further comment on the evidence, except to say that there was no evidence that the deceased was under seven years of age. He was referred to by several witnesses as a "little boy." Instruction No. 3 given by the court at the request of plaintiff is as follows:

"3. The court further instructs the jury that, if they believe from the evidence, that plaintiff's intestate, at the time of the accident, was a child between the age of six and seven years, then he could not, because of his tender years, be guilty of, or be charged with carelessness or negligence in respect to the accident in this case, so as to relieve at all any want of due care on the part of the defendant company, so that, if the jury further believe, from the evidence, that the accident, causing the death of plaintiff's intestate, was due to the want of due and ordinary care by the defendant company, or its servants, as charged in the declaration or some count thereof, then you should find a verdict for the plaintiff, and no want of care by the plaintiff's intestate will save the defendant from the liability for the accident."

It is the law of this state that a child under seven years of age is deemed incapable of exercising care, and contribu-



Very negligence cannot be imputed to him. (Chicago City Railway Co. v. Tucky, 196 Ill. 410, 423; Illinois Central R. Co. v. Jernigan, 196 Ill. 287; Richardson v. Nelson, 321 Ill. 254, 257.) But in this case there was no evidence that plaintiff's intestate was "between the age of six and seven years," or under seven years of age, and the instruction was therefore misleading and erroneous. (Chicago, Rock Island & Pacific R. Co. v. Fininger, 114 Ill. 79, 83.) "An instruction that submits it to the jury to find if a certain fact exists, virtually tells them that there is evidence tending to prove such fact, and if there is no evidence tending to prove it, the instruction is calculated to mislead the jury, and is erroneous." (Clement v. Boone, 5 Ill. App. 109, 111.)

Complaint is also made of the giving of instructions Nos. 4, 5 and 6. All of these instructions directed a verdict for the plaintiff if the jury found the facts as therein severally stated, but each instruction omitted entirely the element of the exercise of ordinary care by the deceased for his own safety. These instructions were therefore erroneous and the error could not be cured by other instructions. (Illinois Iron & Metal Co. v. Weber, 196 Ill. 526, 531; Batner v. Chicago City Ry. Co., 233 Ill. 129, 173; Mooney v. City of Chicago, 238 Ill. 414, 421.)

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.



408 - 19810.

JAMES ARTHUR DOYLE, a minor, by  
his next friend,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

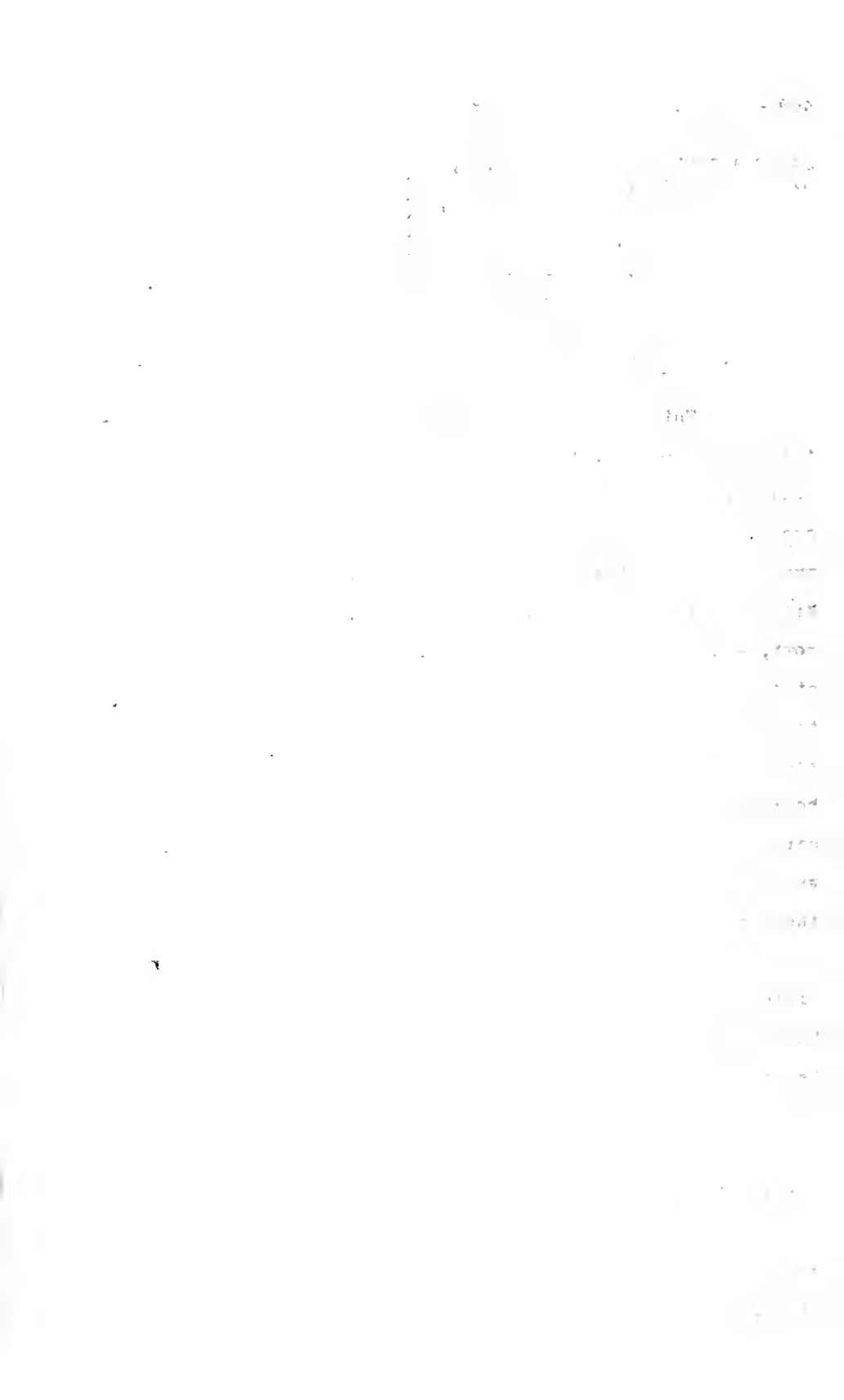
COOK COUNTY.

139 I.A. 438

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment obtained by appellee, the plaintiff, against the defendant, appellant, in the Superior Court of Cook County, for \$4000 and costs. The plaintiff, Doyle, a young man nineteen years old, was working for the Empire Tire Company, 13th street and Michigan avenue, Chicago, in June, 1910. He was doing heavy work, - handling automobile tires. After visiting a friend at the close of his day's work at "The Fair" barn, they went to three saloons and got a couple of drinks of beer and some sandwiches at each place, and attended a show; then Doyle boarded a Center avenue car for his home. Doyle entered the car and sat on the second seat from the back of the car. He was tired and fell asleep. The conductor woke him up when the car reached the end of the line at 74th street. It was then about ten o'clock and dark. Doyle went to the rear platform on the west side of the car and stepped to the ground. He testified that he started around the back end of the car. He stepped out from behind the car from which he had alighted and saw the black body of the northbound car, which he tried to avoid, but the car struck him. He was knocked down and knew nothing more after that until he was in the hospital.

The defendant's testimony tended to show that the plaintiff got off the car upon which he had been riding at the rear platform and that when he stepped off the car, he walked south



along the west side of the car and then went back around the rear end for the purpose of boarding the northbound car.

The defendant's contention is that the judgment should be reversed because, (1) the verdict is against the overwhelming weight of the evidence and is excessive, and (2) because the court erred in submitting to the jury improper instructions. The second ground of reversal is the only one we find it necessary to discuss.

The court submitted to the jury, at the instance of the plaintiff, the following instruction:

"20. The court instructs you that you are the judges of the credibility of the various witnesses who have testified in the case and of the weight you will give to the testimony of each. In doing this you may take into consideration the interest such witnesses may have in the result of the suit, if any; the relation of the witnesses testifying for either the plaintiff or defendant in that suit; any motive or inducement that may appear from the evidence in the case, if any does appear, that may influence such witness to testify falsely; the opportunities of the several witnesses for knowing the things about which they testify; the reasonableness or unreasonableness of the story told; its probability or improbability; its corroboration or want of corroboration by other credible testimony in the case; the appearance and demeanor of the witnesses while testifying; and from these and from all the facts and circumstances shown by the evidence in the case you are to decide how much weight you will give to the testimony of each witness who has testified in the case. The jury in determining the preponderance of the evidence as to a disputed point in the case are not to determine it alone by the number of witnesses testifying upon the one side or the other of such point, but are also to consider the credibility of the witnesses under the rule laid down above."

*Exceedingly*  
The objection is made to the instruction, that the plaintiff's case rested very largely upon his own testimony; that as to the most material of the disputed points, his testimony was contradicted by his two and defendant's five witnesses, and that more witnesses testified for defendant than for the plaintiff, and that when an instruction attempts to define preponderance of the evidence and then gives an enumeration of matters proper to be considered by the jury but omits the number of witnesses testifying for and against, it is reversible error.  
*1000*  
Lyons v. Ryerson & Sons, 242 Ill. 409, and C. & J. E. Ry. Co.





v. Lawlor, 229 id. 621, are cited in support of the contention. In our opinion, upon the foregoing authorities, the giving of the instruction was reversible error in this case.

REVERSED AND REMANDED.



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|---------------------------|---|---------------|
| PEOPLE, ex rel. ROBINSON, | ) |               |
| Appellee,                 | ) | APPEAL FROM   |
|                           | ) |               |
| vs.                       | ) | CIRCUIT COURT |
|                           | ) |               |
| KNIGHT, et al.,           | ) | COOK COUNTY.  |
| Appellants.               | ) |               |

109 I.A. 449

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County, awarding a writ of mandamus against defendants, appellants, as Commissioner of buildings and Deputy Commissioner of Buildings of the city of Chicago, to revoke a permit issued for the erection of a theatre building at 4853-4859 South Ashland avenue, Chicago, and to stop the work upon said building and not to issue a new permit until certain structural parts of the building are removed and have been replaced by structural parts as required by the ordinances of the city of Chicago.

The original petition made Robert Knight, as deputy and acting commissioner of buildings of the city of Chicago, the sole party defendant, and a general demurrer to such petition was sustained. The petition was then amended by adding as parties defendant, Henry Ericsson, commissioner of buildings of the city of Chicago, and Lola Menn, owner of said theatre building, and by changing a clause in paragraph eight in the original petition. An order was thereafter entered requiring the defendant Knight to answer the petition, as amended, within five days. To the petition, as amended, the respondents, Ericsson and Menn, filed general and special demurrers, and an order was entered setting aside the order requiring Robert Knight to answer, and granting him leave to join in the general and special demurrer of Henry Ericsson.

After argument on the above mentioned demurrers was had, but before the ruling was made thereon, the relator moved the

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court for leave to again amend his petition instantly, which motion was allowed, and the petition was amended by striking out such words in the petition as made certain of the allegations therein upon information and belief. Attorneys for respondents thereupon asked the court for leave to file instantly general and special demurrers to the petition as amended by the court to contain further grounds of special demurrer, which leave was denied. The court thereupon, over objection of the attorneys for respondents, overruled their demurrers to the petition as amended, and ruled the respondents to answer the petition within eight days. On the morning following this order, the respondents, Henry Ericason and Robert Knight, due notice having been given, again moved the court for leave to file instantly a joint and several general and special demurrer to the petition, a copy of which demurrer was presented to the court and set out additional grounds for special demurrer. The court denied the motion. Thereafter, at the expiration of the rule, the court entered a default judgment against respondents Ericason and Knight for failure to answer the amended petition within the time ordered by the court, respondents having interposed a motion in arrest of judgment. *To reverse the judgment "stand by" appeal*

The petition, as amended, set forth that the relator is a resident and taxpayer of the city of Chicago, and that the matters set out in the petition are of public importance to the people of the state of Illinois and city of Chicago, wherefore the petition was filed; that the city of Chicago had passed certain building ordinances which are named and set forth in the petition; that the respondents, Henry Ericason is commissioner, and Robert Knight is deputy commissioner of buildings and acting as commissioner of buildings in the absence of Ericason. That on March 14, 1912, a permit was issued for the construction of a theatre building to seat more than three hundred people, and classi-



fied under clause V of the building ordinances, at 4356 South Ashland avenue; that construction work on the same was thereafter begun and continued until October 15, 1912, when the work was stopped because of certain violations of the building ordinances; that on November 23, 1912, a report of alleged violations was made by a building inspector of the city to the commissioner of buildings; that work on said building was at a standstill on January 20, 1913, and additional reports were made to the commissioner of buildings of alleged violations, together with recommendations; that all or many of the violations referred to in the above reports then existed and still exist, and that it was the duty of the commissioner of buildings to revoke the permit and require that the parts of the building constructed in violation of the building ordinances be reconstructed; that the commissioner of buildings did not revoke the permit, but, on or about February 15, 1913, permitted the construction of said building to be resumed without issuing any new or additional permit therefor.

The petition then sets forth that the rear brick wall of said theatre is a wall of one story and is of a greater height than thirty feet; that it is approximately fifty feet high and approximately forty feet long, and is not strengthened by pilasters or pillars, and that for approximately thirty-five feet from the top is not more than twelve or thirteen inches thick, which thickness violates the ordinance requiring that a wall over thirty feet in height shall not be of less thickness than sixteen inches for the upper fifteen feet thereof, and shall be increased four inches in thickness at each interval of fifteen feet or fractional part thereof of height; that the west part of the north wall does not contain the number of buttresses shown on the approved plans for the construction of said building and that the principal girders and trusses bear upon the wall at one side of, instead of upon, the buttresses, in violation of the ordinances requiring that principal





girders and trusses shall bear upon buttresses if used; that the west part of the north wall exceeds thirty feet in height and was originally about twelve inches in thickness for a distance of more than twenty feet from the upper part of same, and that an extra course of brick has been laid on the outside of same in violation of the ordinance providing that the bond of brick work shall be formed by laying a course of headers for every five courses of stretchers; that the extra course of brick, as laid, does not strengthen the wall; that the aisle approaching an exit in the balcony is approximately two feet nine inches in width and the exit is approximately three feet in width; that said exit is at least six feet easterly from the lowest part of said balcony, whereas the ordinance provides that the floor shall extend for an unbroken width of not less than four feet in front of such exit, and shall be two feet wider than such exit; that the masonry foundations are laid in lime mortar and not in cement mortar as required by ordinance; that the plate girder of steel or iron supporting the front wall of said building is overstressed at least forty per cent. above the maximum stressing allowed by ordinance; that the plate girder referred to bears upon common brick piers laid in lime mortar, and that said piers are overstressed at least fifty per cent. beyond the maximum stress allowed by ordinance.

The petition alleges a part of the violations was reported to the building commissioner by his deputy; that on or about January 20, 1915, a report in writing was made to the commissioner of buildings, signed by three of his assistants, one of them an architectural engineer, one a chief inspector and the other a district inspector. This report set out many and grave violations of the building code, and, accompanying the report as to the condition of the building, were the recommendations of the above mentioned officials. That all or many of the violations of the building ordinances in the construction of said building referred to in the



reports still exist with respect to the structure, and it is averred that it was the duty of the commissioner of buildings to revoke the permit previously issued for the construction of the building.

The prayer of the petition is that Ericsson, as commissioner, and Knight, as deputy commissioner of buildings of the city of Chicago, be commanded forthwith to revoke the permit for the construction of the said building, and to stop the work upon the building, and require all persons engaged therein to stop and desist therefrom, and not to issue or allow to be issued a new permit until the foundations, constructed in violation of the ordinances, have been removed and have been replaced by foundations as required by said ordinances, and until the said west wall of the structure has been taken down and replaced by a wall in accordance with the requirements of the ordinances, and until the said west part of the north wall of said building is either demolished and rebuilt in accordance with the requirements of the building ordinances or until the said additional part of the wall has been bonded to the old wall in accordance with the terms and provisions of the ordinances, and until the principal girders and trusses of the structure and the buttresses are so placed that the principal girders and trusses shall bear upon said buttresses, and until the aisle and floor in front of the exit near the west end of the balcony of the structure and the exit itself, and the aisle shall be made to comply with the building ordinances, and until the plate girder, sustaining the east wall of the said structure, has been removed and a new girder substituted therefor of a carrying capacity sufficient to comply with the requirements of the ordinances, without overstressing the same, and until the piers sustaining the plate girder, which is in and sustains the east wall of the structure, have been removed and piers substituted therefor of a strength and stressing required by the ordinances.



It is attempted by appellants to raise the question on demurrer that a petition for mandamus filed in the Circuit Court to enforce a public duty must be verified or supported by affidavits. In our opinion this question cannot be raised on demurrer. The great weight of authority is to the effect that neither the want of an affidavit or verification to a pleading, nor the insufficiency of such verification is ground for demurrer. A motion to strike from the files is the proper mode to raise the question. (31 Cyc. 285, and cases there cited.) A demurrer admits the truth of the material averments which are well pleaded in the petition, and thus supplies the want of a verification where it is required. (Zimmerman v. Kinsey, 24 Ill. App. 484; Pudney v. Burkhart, 32 Ind. 179; People v. Commissioners of Cook County, 178 Ill. 373, 381; Rowe v. The People, 26 Ill. App. 436). The objection that a pleading is not verified or that its verification is insufficient goes only to the reception of the pleading, not to its legal effect, which is put in issue by a demurrer. (Bank oficksburg v. Blocomb et al., 14 Pet. 30). But, under the mandamus act of 1874, mandamus in the Circuit Court is an ordinary action at law, and is governed by the same rules of pleading as are applicable to any other actions at law. (The People v. Board of Education, 238 Ill. 154; The People v. Life Indemnity Co., 231 id. 613; Langan v. Drainage District, 239 id. 430). The statute does not require the petition to be verified, and we think a verification is no longer necessary. (Rowe v. The People, supra; Hall v. Mann, id. 350).

It is contended that the trial court erred in refusing appellants leave to file instanter general and special demurrers to the petition as finally amended by striking out such words in the petition as made certain of the allegations upon information and belief, the petition having been verified. As we have said above, the statute of 1874 does not require the petition to be verified, and the affidavit thereto no longer serves any purpose.

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Treating the petition as a common law pleading, striking out the words by the amendment was a merely formal matter. The amendment introduced no new issue, nor did it change any of the issues presented by the petition. The court had before it and under consideration the undisposed of demurrers. We can see no useful purpose to be accomplished by granting the leave requested. The court did not err in refusing to allow the demurrers to be filed.

As stated above, the demurrers of appellants to the petition admitted all the material facts properly alleged in the petition. Among the facts well pleaded are numerous and grave violations of the building ordinances of the city of Chicago.

It is not controverted that mandamus lies to compel the performance by a public officer of ministerial duties. If a duty is purely ministerial and not judicial or discretionary, mandamus will lie to compel performance. The principle of law is clearly set forth in Vol. 19, Am. & Eng. Encyc. of Law, (2nd Ed.) at page 746, as follows:

"If the duty involved is purely ministerial and not judicial or discretionary, and if the duty itself is imperative, specific and defined, mandamus will lie not only to compel general performance, but to compel performance in a particular and specific manner."

The law as above expressed is so well settled that we deem it unnecessary to cite further authority in support of it, but shall pass at once to a consideration of the duties of the commissioner of buildings under the ordinances set up in the petition.

Clause c of section 200 1/2 of the ordinance provides that it shall be the duty of the commissioner of buildings to enforce all ordinances relating to the erection, construction, situation, repair, removal or the safety of buildings.

Section 203 gives authority to and makes it the duty of the commissioner of buildings to tear down buildings erected in

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violation of the ordinances, after notice given and non-compliance therewith, that the building or structure or part thereof has been, or is being, constructed or erected contrary to the ordinance provisions, and requiring the person so notified to forthwith make such building, structure or part thereof conform to and comply with the provisions of the ordinances, and specifying the time within which such work shall be done.

By section 233, it is made the duty of the commissioner to revoke the permit for the building or wrecking operations in connection with which any such violations of the ordinances shall have taken place.

By these three sections of the ordinances it is clearly made the duty of the commissioner, in cases of violation of the ordinances, to give the notice provided for therein, and (1) if the notice is not heeded, to tear down the building or structure, and (2) to revoke the permit. There is no express or implied discretion given to the commissioner in these sections to adopt either one of the three courses of action. If the notice is not heeded, the commissioner must proceed to tear down the structure and revoke the permit, and no discretion is lodged in him relative to the subject matter of the provisions of section 232, or of section 233.

In *Flournoy v. City of Jeffersonville*, 17 Ind. 174, (quoted and followed in *Galey v. Board*, 174 id. 181; *State v. Loechner*, 33 Neb. 314, and *Billingham v. Dye*, 173 Ind. 333), the court in defining a ministerial act, says:

"A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."

And in *The Styra v. Morgan*, 186 U. S. 1, 9, the Court says:

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"The term discretion implies the absence of a hard and fast rule. The establishment of a clearly defined rule of action would be the end of discretion. \* \* \* Discretion means a decision of what is just and proper in the circumstances. 'Sousier's Law Dictionary.' Discretion means the liberty or power of acting without other control than one's own judgment." Webster's Dict."

In *Bennett v. Norton*, 171 Pa. 221, the court gives a definition of discretionary power as follows: "A discretionary power involves an alternative power; i. e., a power to do or refrain from doing a certain thing."

Under the provisions of the ordinances set out in the petition, there is, in our opinion, no liberty or power of acting conferred upon the commissioner of buildings upon his own judgment as to what action is just and proper under the facts and circumstances presented in the petition, for the ordinances clearly direct him as to his course of action. Section 233 says: "If the work \* \* \* shall be conducted in violation of \* \* \* this Chapter, it shall be the duty of the commissioner to revoke the permit." Section 203 provides that whenever it shall be found that a structure is being built "in violation of any of the provisions of this chapter, the commissioner of buildings shall forthwith notify the owners," etc.; if at the expiration of the time specified in the notice the person so notified shall have refused, neglected or failed to comply with the request made in such notice, it shall be the duty of the commissioner to proceed forthwith to tear down or cause to be torn down such structure. These provisions are mandatory and specific, and leave no field open for the exercise of personal judgment. They command ministerial acts to be done by the commissioner. (*Brokaw v. Highway Commissioners*, 130 Ill. 482; *State v. Doyle*, 40 Wis. 176; *Insurance Co. v. Raymond*, 70 Mich. 485).

The mere fact that the commissioner of buildings is required to determine whether or not the facts exist, which, under



the provisions of the ordinances, require him to act, does not make the act which he is to perform discretionary, or call for the exercise of judgment and discretion on his part. The act to be performed on a violation of the ordinance is strictly of a ministerial character, prescribed by the ordinances, and involves no discretion of any kind. Every officer who is called upon to discharge a ministerial duty must first determine whether a case is presented which requires him to act. (C. B. & Q. R. R. Co. v. Wilson, 17 Ill. 123). In *Flournoy v. City of Jeffersonville*, supra, it is held: "And the act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." where a specific act is directed, as by the ordinances set out in the petition, a different case arises from those cases cited for appellants where it has been attempted to control and regulate a general course of official conduct by mandamus, and such cases are not applicable to the instant case.

The allegations of the petition are, in our opinion, definite and specific, and show many serious violations of the building ordinances of the city of Chicago, and that such violations were, in fact, known to the commissioner of buildings and to his deputy commissioner. The duty to act, imposed by the ordinances in accordance with the prayer of the petition, is plain and clear, and the relator and the public have a clear legal right to have the writ issued as prayed.

The judgment of the Circuit Court is affirmed.

APPELLED.



475 - 19878.

Plaintiff

WILLIAM H. PARRY,

Appellant,

APPEAL FROM

vs.

CIRCUIT COURT

HENRY EDWARD PARRY,

Appellee.

JAMES A. HARRIS.

109 I.A. 452

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court, dismissing a bill for divorce brought by appellant, William H. Parry, complainant, against Henry Edward Parry, defendant, charging several acts of extreme and repeated cruelty and using indecent and profane language in her presence and in the presence of her friends. The evidence was heard in open court by the chancellor. Questions of fact only are involved. The charges of cruelty made in the bill are denied in the answer. The complainant's testimony is in part corroborated by the evidence of her sister, Mrs. Conner, by Miss Harschbarger, and Mrs. Peterburg. The defendant, in his testimony, denied and contradicted the testimony of complainant and her witnesses, and some parts of the testimony of the complainant and that of her witnesses are flatly contradicted by the testimony of the twenty-six witnesses for the defendant.

There are four distinct allegations of cruelty in the bill; namely, that on March 19, 1907, appellee struck appellant with his fist; on April 27, 1908, appellee struck appellant with a paper knife, cutting her over the eye; in September, 1908, appellee kicked appellant with his foot covered with a shoe, causing her pain; in February, 1909, appellee struck appellant with his clenched fist, causing her severe pain; and on May 27, 1909, appellee threatened the life of appellant with a revolver. It is also claimed by appellant that during the first part of their married life, appellee compelled appellant to submit to an abortion.





Upon a consideration of all the evidence bearing upon these specific charges, and having regard to the interest and apparent friendship and close relation of the witnesses of the complainant to the complainant herself, the nature of the stories told by the complainant and her witnesses so far as they corroborated her, and the probabilities of the truth of the stories when all the evidence is considered, we are not convinced that appellant made out her case by such a preponderance of the evidence as requires this court to reverse the finding of the chancellor who had the witnesses before him and was able to observe their bearing and attitude on the witness stand. Some consideration must be given to the finding of the trial court where the witnesses were examined orally on the hearing so that the chancellor had the same facilities for judging their credibility as a jury has. The finding of the chancellor, where the trial is so conducted in open court on conflicting evidence, has the same force and effect as a reviewing court as the verdict of a jury, and ought not to be disturbed or set aside unless it is palpably against the weight of the evidence. (*Boari v. Isen*, 21 Ill. 275; *Bracewell v. Isen*, 120 id. 140; *Village of Itasca v. Schroeder*, 132 id. 191).

No useful purpose would be subserved in a detailed review by this court of the evidence of the many witnesses produced on the hearing of the case, and we shall not extend this opinion by such a review. In our opinion, the chancellor took a sensible view of the evidence in holding that the charges of cruelty alleged in the bill of complaint were not supported by the preponderance of the evidence. We cannot, therefore, sustain on any reasonable grounds the contention of appellant that the court erred in its finding of facts.

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The only other question presented is whether the court properly excluded on rebuttal the evidence of the witnesses . . . Ash, Mrs. Atwill, Mrs. Cummings, and Mr. Conner. The testimony excluded was offered on rebuttal and related to the main case made in the bill. It was within the discretion of the chancellor whether the testimony should be admitted or not, and we think the action of the court in excluding the evidence was not erroneous.

The decree of the circuit court is affirmed.

APPROVED.



486 - 19869.

WILLIAM H. McFARLAND,  
Appellee,

vs.

GEORGE W. JACKSON, Incorporated,  
and WILLIAM H. LOTTE,  
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

1391A. 453

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

Plaintiff, McFarland, appellee, recovered judgment against the appellants, defendants, for personal injuries. The plaintiff was employed by the defendant, George W. Jackson, Incorporated, and prior to and at the time of the accident, on or about February 25, 1911, was working under the direction of defendant Lotte, as foreman for George W. Jackson, Incorporated.

The declaration contains three counts. Each count alleges that the defendants were moving a beam of a ton in weight by means of two dollies, or rollers, which were adapted to move the beam lengthwise and not sideways. The first count alleges defendants employed an unsafe method of moving dolly and beam sideways by causing another servant to pry and move the dolly and said beam with a crowbar, which caused the girder to tip and fall on plaintiff's foot. The second count alleges that the defendant, George W. Jackson, Incorporated, by its foreman, Lotte, gave a dangerous and unsafe order to another servant to move the dolly and the beam sideways, which the other servant did, and the beam was caused to tip and fall upon plaintiff's foot. The third count alleges the selection and execution by defendants of a dangerous and unsafe method of moving the dolly and beam sideways and failure to warn the plaintiff of the danger. The other necessary allegations of due care on the part of plaintiff, of knowledge



on the part of defendants, of no knowledge on the part of the plaintiff, and no equal means of knowing, and that defendant Lotts was not a fellow-servant, and other necessary averments are contained in all the counts. Defendants filed the general issue to the declaration.

The plaintiff was a structural steel and iron worker, thirty-nine years old. Defendant, George W. Jackson, Incorporated, was doing some work under and upon the elevated railroad at Franklin and Van Buren streets, Chicago, Illinois. The elevated structure was overhead and there were five t-cars running in Van Buren street at the time. There was a continuous roar from the elevated trains and an also a continuous stream of teams passing back and forth in Franklin street. Working with the plaintiff, and under the direction of defendant Lotts, were Lembach, Kraxer, Greichen (spoken of in the record as "Gratches"), and Kennedy. Lotts told the men to go to the southeast corner of Van Buren and Franklin streets, where the beam in question was lying, and move it to the southeast corner of the same streets. It was an I-beam, thirty-four feet long, two feet deep and had two flanges 7" wide. The web between the flanges was 5/8" thick and the beam weighed 3400 pounds.

Two dollies were used in moving the I-beam over the street. Each "dolly" consisted of a square wooden frame of square strips of wood 4 inches by 4 inches, two feet long; on top of this frame or base, which was 4 inches across its outside dimension and 16 inches across its inside dimension, was placed a cast-iron roller about 26 inches long, 6 inches in diameter, and fastened to the wooden frame by means of a rod run through the roller. The top of the roller, then used as a "standing" dolly, was 10 inches from the ground and the beam placed on the roller, with one of the 7-inch flanges for its bearing surface, was 34 inches at its top flange from the





ground. If the beam were exactly in the center of the dolly roller, there would be about 6 inches on either side between the edge of the flange and the edge of the roller.

These dollies were designated either "running" dollies or "standing" dollies, according to the manner in which they were used. If the roller was placed on the ground with the frame up, the dolly traveled with the load placed on it like a caster under a table being moved, and was called a "running" dolly. If the dolly was placed frame on ground, with roller up and the load was pushed or rolled across it, the frame remained still and did not move at all, and when thus used, was called a "standing" dolly.

The surface of the intersection of the streets was paved with granite blocks and was uneven and very rough; and the dollies were used as "standing" dollies because the pavement was too rough to run the dollies over it.

When Letts gave the order above mentioned, the five men bore down on one end of the beam which was on a loading block, and put a standing dolly under the beam. After it was pushed ahead north, another standing dolly was put under the beam. In order to point the beam toward the southeast corner of the intersection, the beam was pushed forward until it rested at its center on one dolly and the other dolly was moved forward and placed toward the southeast, and the beam was steadied and straightened as it went forward by a crowbar placed with its point inside the square dolly frame perpendicularly against the beam. No prying was used in this operation. The beam was got to the southeast corner so that it lay northwest and southeast. At the southeast corner stood two piles of cribbing about ten feet apart, with a steel column supporting the elevated road between them. This cribbing consisting of short timbers, one pair superimposed crosswise at the ends upon another pair, and so on, up to the top,



forming temporary piers to support weight. The west pile of cribbing was in Van Buren street, right at the curb corner, and the other about 10 feet east thereof in the same street. The beam was to go between the west cribbing and the steel column. The beam having been pushed northeasterly as far as was desired was then pivoted on a dolly, and was then swung around so that the end that had been pointing southwesterly was pointed southeasterly. This movement swung the beam probably a quarter of the way around. The beam was then moved southeasterly by taking out the rear dolly and putting it under the forward end of the beam as the movement progressed. The progress of the beam was blocked by the west cribbing. Defendant Lotts was personally supervising this work, and saw where the beam was headed, and that the south end must go further to the east in order to go between the west cribbing and the steel column. At this state of affairs, the beam rested on the two dollies. One was about 5 feet from the south end of the beam, and the other north of the middle. Kennedy was on the east side of the beam at the south end. Greichen was standing at the north end at the east side. Lombach stood at the north, or center, dolly on the west side of the beam with a crowbar in his hand. Lotts stood about two feet from Lombach on the west side of the beam between Lombach and the north end of the beam, and obstructed plaintiff's view. Kruger was north of Lotts on the west side of the beam. Plaintiff was standing at the north end of the beam west of Greichen. Lotts told Lombach to pry the dolly and beam over to the east. Lombach attempted to insert his bar under the dolly frame and it did not take hold. He tried again and secured a hold; the dolly moved about an inch and a half, and the square edge of the dolly frame caught against a granite block. At this time the east side of the bottom flange of the beam was about two inches from the east

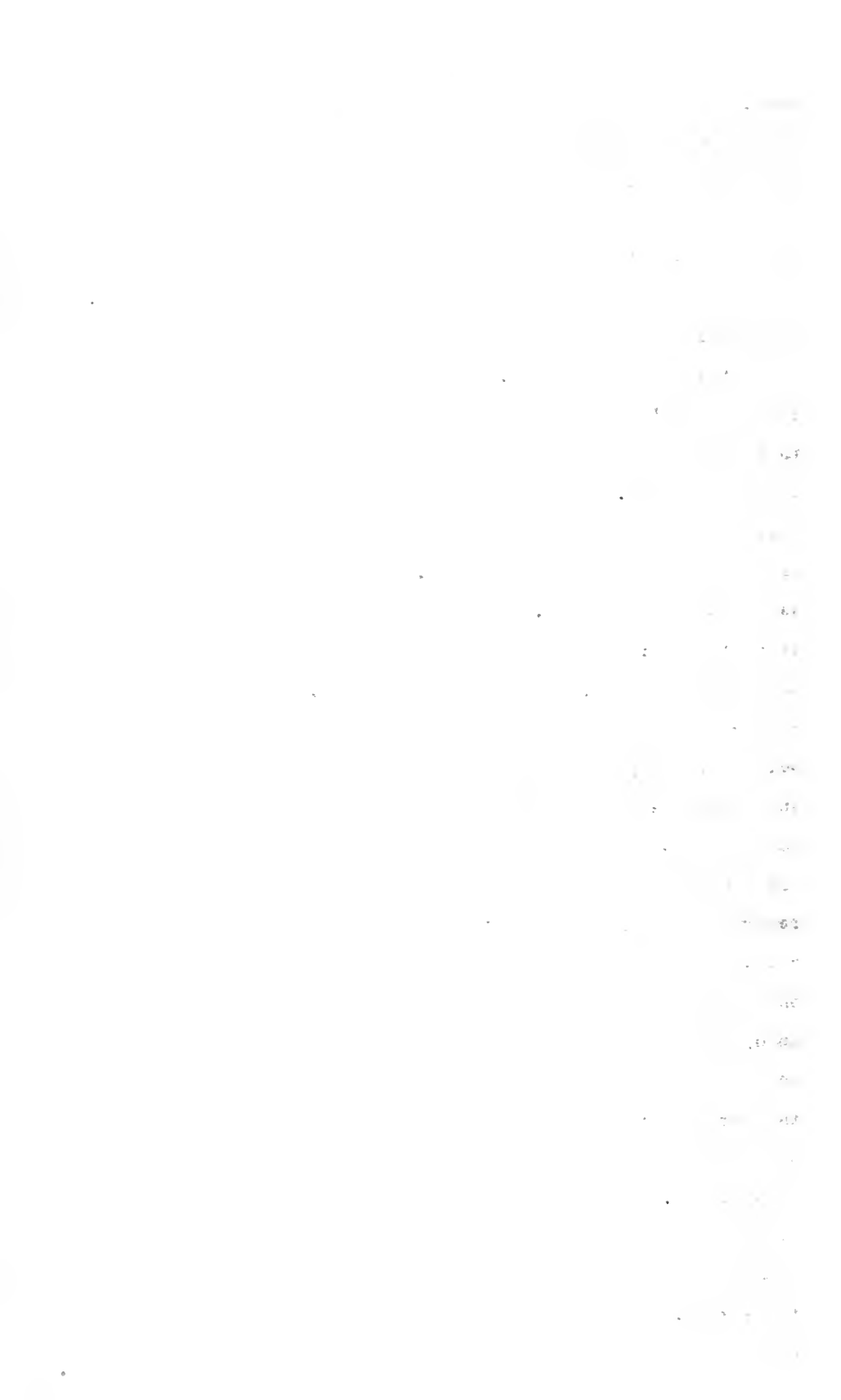


edge of the dolly roller, the beam being east of the center of the dolly four or five inches. The east side of the dolly had been slightly raised by this movement, and the momentum and sudden stopping of the dolly by the unevenness of the pavement caused the beam to slip off the east side of the middle dolly, and, as its south end was bearing on a dolly roller, it ran back 15 to 18 inches north and the north end of the beam fell upon and crushed McFarland's foot into the grooves of the street-car rail. Neither Greichen nor McFarland heard Lotts give the order to Lambach; neither saw clearly what Lambach was doing. There was the roar of city traffic in the air, including the noises of the elevated railroad.

Defendants contend that the court erred in entering an order amending or correcting the record of a former trial of the cause. It appears that a jury was withdrawn on the first trial and the case continued for two weeks when it again went to trial. On the second trial, the jury returned a verdict finding "the defendant, George E. Jackson, Incorporated, guilty, and assess plaintiff's damages to the sum of" \$1,370. The verdict was silent as to defendant Lotts, and no other verdict was returned. The defendants entered their motion for a new trial. Thereafter, while the motion was pending, plaintiff entered his motion also for a new trial as to defendant Lotts. These proceedings were had before His Honor Judge Carnes, the trial judge on the second trial. Thereafter Judge Carnes granted a motion for a new trial as to the defendant George E. Jackson, Incorporated, on its motion and granted a new trial as to defendant Lotts on the motion of plaintiff. The minutes of these orders were entered immediately by the minute clerk in the minute book kept and used in the court room. The minutes of the motions and orders above mentioned were, by the clerk, then respectively transcribed in another minute book which was kept and used in



the law record writers' room in the office of the clerk of the Circuit Court, and from which the record writers wrote the extended orders in the law record. Three or four days after the orders granting a new trial were entered, clerks of the defendants' attorneys saw the minute clerk Gransin, and persuaded him that the order, as written up, was not correct. No notice was given to plaintiff's counsel and no motion was presented to Judge Garner. The minute clerk went downstairs to the clerk's office, and, with a pen, drew a line through that part of the minutes which ordered the new trial as to defendant Lotts. The law record writer in the clerk's office thereafter extended in the amplified record an order which granted, upon motion of George W. Jackson, Incorporated, defendant, a new trial. The language of the extended order is as follows: "This cause coming on to be heard upon the defendant George W. Jackson, Incorporated, motion heretofore entered for a new trial in said cause after arguments of counsel and due deliberation by the court said motion is sustained and a new trial awarded." The motion heretofore entered was as follows: "Whereupon the defendants enter their motion for a new trial in said cause." The foregoing changes in the record were made in October or November 1912. The cause was called for trial on March 21, 1913, and the jury was empanelled and sworn to try the issues, and plaintiff's attorney made an opening statement. Thereupon defendants' attorney moved to dismiss as to defendant Lotts, urging that the silence of the former verdict as to Lotts was tantamount to a verdict of not guilty as to him, and that no new trial was ever granted as to Lotts. The plaintiff moved to correct the record and offered the minute books and pages therefrom in evidence, and pages in the law record writers' minute book transcribed from the former. Two witnesses were called to identify the minute books and to explain the method and manner of entering orders,-





one a law record writer, the other the minute clerk, or deputy clerk, who had entered Judge Carnes' orders. From the testimony of these witnesses it appeared that the minute clerk, who made the original entry in the minute book used and kept in the court room, called the "yellow book", drew his pen through the entry in the law record writers' book kept in the office as above stated on the request of the clerk of attorney for the defendants without any authority of any kind, and without any order of court. The original entry in the minute book, called the "yellow Book," and the original entry as mutilated in the law record writers' book, called the "black Book," together with the evidence showing how and when the record was changed, were before the trial judge on the motion to correct the record so as to make it speak the truth, and when the nunc pro tunc order in question was entered. In our opinion, there were sufficient memoranda before the court to warrant the court in making the nunc pro tunc order amending the record. The cause had never been disposed of by a final judgment as to either of the defendants, but was still pending before the court, and the court had full power and authority to correct the record and make it speak the truth. (Knefel v. The People, 187 Ill. 212; The People v. Miller, 256 id. 88; Merrifield v. W. C. P. & O. Co., 140 Ill. App. 1). The authorities cited by appellants are all cases where amendments were attempted to be made after final judgment and after the judgment term had passed, and are, therefore, not in point. The order correcting the record was properly made.

It follows from what we have above said that the court did not err in refusing to dismiss the case as to William Lotte. The record, as corrected, showed that the cause was pending against Lotte, and no reason for dismissing the cause as to him appears.



We find no basis in the record for the contention made on behalf of appellants that there is a variance between the allegations of the declaration and the proof. The first count alleges that the defendants negligently adopted an unsafe method to move sidewise both dolly and beam by prying it over with a lever or crowbar. The second count alleges the negligent order given by Lotte. The third count charges that the defendants failed to warn plaintiff of the fact of the sidewise movement and of the danger. The variance is urged on two grounds, (1) that no proof was offered showing that the method of moving the dolly and beam sidewise was unsafe or was negligent, and (2) the plaintiff was allowed to show the rough condition of the street pavement as an element making the method dangerous and unsafe without having alleged the rough condition of the street in each count. In our opinion, neither of these grounds is valid. The evidence furnishes abundant basis for a finding by the jury that the method adopted was unsafe and negligent; and under the averments of the different counts evidence of the rough condition of the street was admissible. Direct evidence of the opinion of witnesses, suggested by appellants as necessary, that the method was unsafe and negligent would have been a clear invasion of the province of the jury, and, therefore, incompetent. (Yarber v. C. & A. Ry. Co., 335 Ill. 569; Hoffman v. Tosetti Brewing Co., 357 Id. 185; Yeafe v. Arcour & Co., 358 Id. 38).

Upon a review of the evidence, we have reached the conclusion that it supports the verdict. The beam in question weighed a ton and a half. When resting on a dolly on its 7-inch flange, it was raised ten inches from the ground and its top was 34 inches from the ground. It was necessarily unstable. When the dolly rollers were laid on the ground, the beam could be moved lengthwise without disturbing its center of gravity. But, it is apparent that while the beam



was resting on its narrow flange it would be unsafe to tilt one side of the dolly up and thus disturb the elevated center of gravity. Yet, the dolly and beam could not be forced sidewise with a crowbar without lifting one side of the dolly in forcing the crowbar under it. This was done, and it was just what defendant Lotts ordered to be done without warning to plaintiff who did not hear the order, or have any knowledge of it. At the time Lotts selected the method, he knew all the conditions existing and the danger attendant upon such a method and the positions of the men including the plaintiff. In obedience to the laws of nature, "the beam moved quickly toward the north and toward the east," when Lerbach thrust his crowbar under the side of the dolly frame and lifted up a little to pry it over. The jury was warranted by the evidence in finding that the method of moving the dolly and beam was dangerous and negligent; that the order given by Lotts was negligently given; that Lotts represented George W. Jackson, Incorporated; and that the plaintiff did not hear or know of the order and was not warned by Lotts. These facts formed good ground for recovery in the case unless plaintiff assumed the risk of the injury which he received.

As to this question of assumption of risk, one principle is that the employee must have knowledge of the danger to which he is subjected. (Malloy v. Kelly-Atkinson C. Co., 144 Ill. App. 326). Another is that the servant does not assume risks arising from the master's negligence. (Klofeki v. R. R. S. Co., 335 Ill. 140). "Anticipation of negligence in others is not a duty which the law imposes. On the contrary, it is a presumption of law that every person will perform the duty enjoined by law or imposed by contract". (Chicago City Ry. Co. v. Pennington, 196 Ill. 9). Plaintiff was not constructively charged with knowledge of the order or the method by law, or by the previous conduct of the work.

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used.

3. The third part is a discussion of the results obtained.

4. The fourth part is a conclusion and a summary of the findings.

5. The fifth part is a list of references and a bibliography.

6. The sixth part is a list of figures and a table of contents.

7. The seventh part is a list of tables and a list of figures.

8. The eighth part is a list of tables and a list of figures.

9. The ninth part is a list of tables and a list of figures.

10. The tenth part is a list of tables and a list of figures.

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16. The sixteenth part is a list of tables and a list of figures.

17. The seventeenth part is a list of tables and a list of figures.

18. The eighteenth part is a list of tables and a list of figures.

19. The nineteenth part is a list of tables and a list of figures.

20. The twentieth part is a list of tables and a list of figures.

21. The twenty-first part is a list of tables and a list of figures.

22. The twenty-second part is a list of tables and a list of figures.

23. The twenty-third part is a list of tables and a list of figures.

24. The twenty-fourth part is a list of tables and a list of figures.

25. The twenty-fifth part is a list of tables and a list of figures.

26. The twenty-sixth part is a list of tables and a list of figures.

27. The twenty-seventh part is a list of tables and a list of figures.

28. The twenty-eighth part is a list of tables and a list of figures.

29. The twenty-ninth part is a list of tables and a list of figures.

30. The thirtieth part is a list of tables and a list of figures.

31. The thirty-first part is a list of tables and a list of figures.

32. The thirty-second part is a list of tables and a list of figures.

The question of assumption of risk by plaintiff was one of fact for the jury, and we find no legal basis in the evidence for a conclusion different from that reached by the jury.

Error is assigned upon the giving of an instruction requested by the plaintiff to the effect that where the master is guilty of negligence, proximately causing the injury to the servant and without which the injury would not have occurred, it is immaterial, so far as the servant's right to recover is concerned, if the negligence of a fellow-servant, if any, combined with the negligence of the master, if any, to produce or proximately contributed to the servant's injury. The instruction is an abstract proposition of law, but, it is not properly subject to the criticism made by counsel for appellant. It is not calculated to mislead the jury. There is only one injury involved in the case and the jury would understand the different clauses of the instruction as referring to the same injury, for it could not be interpreted otherwise. The instruction was not erroneous.

We have examined the refused instructions asked by the defendants in connection with the given instructions, and we think the court did not err in refusing them.

We do not think there was reversible error in the rulings on evidence. Evidentiary facts need not be pleaded in order to be admissible in evidence. As to the claim <sup>that</sup> it was improper to show that no other beams had been moved aside by prying over the dolly and beam prior to the accident, it is a sufficient answer to say that the evidence was admissible on the question of notice to the plaintiff. It tended to show that plaintiff had no notice of the negligent method of doing the work and, therefore, did not assume the risk arising from such method. The evidence was properly admitted. (Kennedy v. Swift & Co., 234 Ill. 511; C. & N. I. R. R. Co. v. Heerey, 203 Id. 499).





We think the claim that defendants were prejudiced by the presence of plaintiff's wife and son in the court room for a few hours is groundless. No objection was made by counsel for defendants until the day following their appearance. When objection was made, the court sustained it, and they were excluded, as were also the wife and son of defendant Lotts. We do not think the presence of plaintiff's wife and child affected the result of the trial, and does not justify a reversal. (C. R. I. & P. R. R. Co. v. Stackman, 204 Ill. 500-509).

We fail to discover any evidence of passion or prejudice in the verdict. We cannot say on review of the evidence bearing on the question of injury suffered by the plaintiff that the verdict of \$4,000 was excessive. There is no hard and fast rule by which damages in personal injury cases can be measured, and unless we can conclude that the verdict as to the damages was dictated by passion and prejudice and was not rendered in the exercise of discretion and sound judgment, it must stand.

The judgment is affirmed.

AFFIRMED.



501 - 19905.

JAMES HANNAH and AVOS W. MARTIN,  
Executors of the Estate of  
JAMES KEENAN, Deceased,

Appellees,

vs.

JOSEPH BIGGIO,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

139 I.A. 460

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment of the County Cook of Cook County, overruling Appellant's motion to vacate a judgment entered by confession, or to stay proceedings under the judgment until trial could be had on the merits.

Upon the hearing of the motion, affidavits of Appellant, Mary E. Quinn and Mary Quinn were read. The affidavit of Appellant sufficiently accounts for the delay in making the application from March 23, 1917, the day on which the judgment by confession was entered, until April 24th, the first day of the April term of said court, when application was made to vacate the judgment.

The competent evidence offered upon the motion tends to show that the note in question, on which judgment was entered, was obtained by fraud and without consideration. It appears from the evidence that the note was executed in blank for an amount alleged to be due on a previous note on which Appellant was surety, and upon the agreement that the amount due on the previous note at the date of the note sued on, should be inserted by James Keenan, now deceased. It further appears that the note on which the judgment was entered was signed relying upon the agreement made by said Keenan, deceased, to insert the amount due on the previous note at that time. The evidence tends to show that the



pre-existing note had then been fully paid and that there was no consideration for the note on which judgment was entered. In our opinion, upon the evidence produced, the court should have set aside the judgment by confession and allowed appellant to make his defense in the writ, or that the proceedings under the judgment should have been stayed with leave to appellant to make his defense on the writ. The court erred in overruling appellant's motion. The judgment is reversed and the cause remanded for such further proceedings not inconsistent with this opinion as the court may be advised is proper and necessary.

REVERSED AND REMANDED.



|                      |   |               |
|----------------------|---|---------------|
| CHARLES BRUHL,       | ) |               |
| Appellee,            | ) | APPEAL FROM   |
|                      | ) |               |
| vs.                  | ) | CIRCUIT COURT |
|                      | ) |               |
| WILLIAM J. ANDERSON, | ) | COOK COUNTY.  |
| Appellant.           | ) |               |

189 I.A. 461

MR. PRESIDING JUSTICE FITCH  
DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for \$7,500 in the Circuit Court in an action brought to recover damages for personal injuries sustained by him on May 11, 1912, when, in endeavoring to cross Washington boulevard at the intersection of 41st avenue, he was struck by appellant's automobile. The gist of the charge contained in the declaration, is the negligent driving of the automobile at a high rate of speed. Appellant contends that the evidence fails to sustain this charge, and also insists that the evidence "conclusively establishes" contributory negligence on the part of appellee.

The evidence shows, without contradiction, that the accident happened about eight o'clock in the evening; that at that time it was dark, was raining hard, and there was a high wind; that the pavement on Washington boulevard is an asphalt pavement 50 feet in width; that just before the accident, appellee was walking north on the west sidewalk of 41st avenue, with an umbrella over his head; that as he reached the end of the sidewalk at the curbstone on the south side of the boulevard pavement, he hesitated a moment, raised his umbrella, looked in both directions, "saw nothing," and then started across at a "trot," or fast walk, holding his umbrella down over his head and shoulders; that at that moment, appellant's automobile, with two headlights and two oil lamps burning, came along the boulevard from the west at a rate of speed estimated by appellant's witnesses at from 25





to 35 miles an hour, and by appellee's witnesses at from 13 to 15 miles an hour; that as the automobile approached the intersection, the chauffeur saw appellee walking across, called out: "Hey, there;" turned the front wheels to the north, and applied the emergency brakes. The sudden locking of the rear wheels caused the automobile to "skid" around toward the south, and it "skidded" across the street intersection, turning completely around, and finally came to a stop, facing southeast, at or near the curbstone at the northeast corner. As it whirled around, the right fender hit appellee, throwing him to the pavement. He fell on his back, face upward, and as the fender passed over him, he took hold of it with both hands and held on until the automobile came to a stop. When he was pulled from under the machine, his back was broken. The evidence shows, without contradiction, that the distance from the south curbstone to the point where appellee was struck by the automobile, was approximately 25 feet, and we think it is clear, from the evidence, that while appellee was crossing this space at a fast walk or trot, the automobile traveled at least 100 feet, if not twice or three times that far. This fact, supported as it is by the extraordinary action of the automobile after the brakes were applied, tends strongly to support the plaintiff's theory that just before the accident, the automobile was traveling at a rate of speed exceeding 15 miles an hour. The evidence further shows that the place of the accident is a residence district in Chicago. Section 10 of the Motor Vehicle Act of 1911, provides that: " \* \* \* if the rate of speed of any motor vehicle or motor bicycle operated on any public highway in this State where the same passes through the residence portions of any incorporated city, town, or village exceeds fifteen (15) miles an hour \* \* \* such rates of speed shall be prima facie evidence that the person operating such motor vehicle or motor

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bicycle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person."

Section 17 of the same Act provides that: "\* \* \* in any action brought to recover any damages for injury either to person or property caused by running any motor vehicle or motor bicycle at a rate of speed greater than is reasonable and proper having regard for the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, the plaintiff or plaintiffs shall be deemed to have ~~been~~ made out a prima facie case by showing the fact of such injury and that the person or persons driving such motor vehicle or motor bicycle was at the time of such injury running the same at a speed greater than was reasonable and proper having regard for the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person."

Under these two sections, proof that appellee was injured by appellant's automobile on a public highway in a residence portion of the city, and that at the time and place of such injury, the automobile was being operated at a rate of speed in excess of 15 miles an hour, made out a prima facie case of negligence on the part of appellant. We have been unable to find any evidence in the record which, in our opinion, overcomes this prima facie case.

As to the question of contributory negligence, appellant's counsel contend with much earnestness and force, that the mere statement of appellee to the effect that just before he started across the boulevard, he looked in both directions and did not see the approaching automobile, is not to be considered as tending to prove that he was in the exercise of due care for his own safety, in view of the uncontroverted fact that the automobile had two headlights



burning brightly; that the rule that one who looks is presumed to have seen whatever is in the range of his vision applies, and that appellee must therefore be charged with the same consequences as if he had seen the lights of the automobile, and ignored them. This argument assumes that there was nothing to prevent him from seeing clearly, or nothing to excuse him from seeing what was apparently within his view. The assumption is not warranted by the evidence. Appellant's counsel admit that the evidence shows that "the night was tempestuous; it was raining heavily and the wind was blowing a gale." The evidence also shows that the boulevard was lined by electric street lamps and trees. When, therefore, appellee looked up the street, he looked through a blinding rain-storm, and if the automobile was going as fast as appellee's witnesses claim - and it was certainly going very fast - it was then at such a distance from appellee as not to be easily distinguished, in the pouring rain, from other lights along the street. The failure of appellee to see the approaching automobile, under such circumstances, is neither surprising nor improbable. The question was one of fact for the jury, and after due examination and consideration of the evidence, we think the verdict of the jury upon that question is not manifestly against the weight of the evidence. In no event can appellee's failure to see the automobile or even his failure to look at all, if such were the fact, be held to be contributory negligence as a matter of law, under the circumstances shown in this case. "It has long been the settled rule in this jurisdiction, that it cannot be said, as a matter of law, that a person is in fault in failing to look and listen if misled without his fault, or where the surroundings may excuse such failure."

(Heidenreich v. Bremner, 260 Ill. 439, 451.)

These being the only questions raised by appellant's counsel, the judgment of the Circuit Court will be affirmed.

AFFIRMED.



STANISLOW SCHNEIDER, by his  
next friend, OTTO OLSON,  
Appellee,  
  
vs.  
  
OTTO NOWACK,  
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

1091A.463

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment against appellant in the Circuit Court in a personal injury action. At the time of the injury, appellee was employed by appellant in the latter's structural iron works. The evidence on behalf of appellee tends to prove that just before the accident, he was called from his work-bench by the foreman, to assist in riveting a heavy angle iron, one end of which rested upon a riveting iron, or "dolly-bar," about three feet high, and the other end of which was held up by another workman; that appellee used a sledge hammer with which to do the riveting; that after he had hit the rivet once or twice, the handle of the hammer broke; that thereupon the foreman ordered him to go under the angle-iron, to get another hammer lying about six feet away; and that while he was attempting to comply with this order, and was under the angle-iron, it turned over and fell upon his left leg, breaking both bones above the ankle. The foreman flatly denied that he gave any such order to appellee, and testified that appellee crawled under the angle-iron without any order or direction to do so, and himself caused the accident by striking against the angle-iron with his back while crawling under it.

The only error assigned, that we can consider, is whether the verdict is supported by a preponderance of the evidence. After due examination of the evidence in the record, in the light of the





arguments presented, we are unable to say that the verdict of the jury is against the weight of the evidence. Appellant's counsel insist there is no evidence to the effect that the foreman directed appellee to go under the angle-iron, rather than around it, to get the hammer; but we find in the record the positive statement of appellee to that effect, and his statement is corroborated, to some extent, at least, by the workman who was holding one end of the angle-iron at the time it fell. There is also evidence that there was reason for haste because the rivet was hot and it was necessary to use the hammer before the rivet had time to cool. No complaint is made of any ruling of the court as to the admission or exclusion of evidence.

One of the instructions is objected to. It purports to state in abstract form, what risks are assumed, and what are not assumed, by an employee. While we do not approve the form of this instruction and doubt its application to the facts of this case, we do not see how it could have misled the jury. Moreover, we have been unable to find any statement in the bill of exceptions that this instruction was objected to, or that any exception to the action of the court in giving it, was preserved, in the trial court.

\* Finding no reversible error in the record, the judgment of the Circuit Court will be affirmed.

AFFIRMED.



473 - 19878.

STANISLAW SCHNEIDER, by his  
next friend, OTTO OLSON,  
Appellee,

vs.

OTTO NOWACK,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

ADDITIONAL OPINION FILED ON PETITION FOR REHEARING.

FITZ, P. J. In their petition for a rehearing, appellant's counsel say that we apparently overlooked the fact that an exception was duly preserved to "instruction No. 3." We did not overlook that fact. We noticed it particularly. But no objection was made by counsel in their briefs that could have any possible application to that instruction. The only objection urged in the briefs to any instruction was that "instruction No. 3" was erroneous "because it assumed that the evidence had shown that the work which the plaintiff did while injured was attended by hazards not incident to his employment, or caused by the negligence of the master growing out of some failure on his part to perform his legal duty towards his servant." The third instruction could not by any possibility be open to this objection. It refers to an entirely different legal principle. The objection might possibly apply, however, to the fourth instruction, because the fourth instruction uses almost the exact language above quoted, and the opinion filed proceeds upon the theory that the fourth instruction was intended. If the objection thus made was intended to refer to the third instruction, it was manifestly groundless. The alleged error in that instruction which is now pointed out in the petition for a rehearing was never before called to our attention nor considered by us. Such an objection cannot be raised for the first time in a petition for a rehearing. The petition for a rehearing will be denied.

REHEARING DENIED.



MARY A. GARVY,  
Appellee,

vs.

DAN BALDINO and WILLIAM  
TORTORIELLO,  
Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

189 I.A. 466

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a decree of the Superior Court, in which, after two general demurrers to appellee's bill had been overruled and the defendants had elected to stand by their demurrers, the bill was taken as confessed, and the defendants were ordered to pay to appellee, within ten days, the sum of \$2,700, or if not paid within that time, to assign and surrender to appellee, as security for the payment thereof, certain notes in their possession, and, in the meantime, that they be enjoined from transferring the notes.

In substance, the bill charges that appellee, being the owner of certain real estate in Cook County, employed appellant Baldino, who was a real estate broker, to find a buyer for her property for the best obtainable price; that Baldino found a purchaser named Laporte, who agreed to pay \$25,200 for the property; that instead of reporting that fact to appellee, Baldino, in violation of his duty as appellee's agent, and in order to derive a secret profit from the sale of her property, entered into a fraudulent arrangement with the appellant Tortoriello, by which the latter, in consideration of \$500 to be paid him by Baldino, agreed to become the ostensible purchaser of the property at the pretended price of \$22,500, and then to convey the same to Laporte for \$25,200; that in pursuance of such arrangement Baldino falsely and fraudulently represented to appellee that Tortoriello was the



real purchaser, and that \$21,500 was the highest price obtainable for the property; that relying upon the representations of Baldino, appellee conveyed the property to Tortoriello, who paid her, ostensibly on his own behalf, but in reality on behalf of Baldino, the sum of \$3,500 in cash, \$500 to Baldino for commissions, and gave his notes secured by trust deed on the property for the remaining \$18,500 of the fictitious purchase price of \$22,500; that a day or two later, Tortoriello completed the fraudulent transaction by conveying the property to Laporte and his wife for the real consideration of \$25,000, thereby obtaining a secret profit of \$2700 in cash and notes, which, in equity and good conscience, belongs to appellee. / X

Reduced to a paragraph, the bill shows that Baldino, while acting as appellee's agent, took advantage of his position of trust to secure to himself a secret and unlawful profit, and that Tortoriello knowingly participated in the fraud and received part of the proceeds. The only real question raised by the demurrers is whether the remedy of appellee upon the admitted facts, is at law or in equity.

Appellant Tortoriello first contends that "notwithstanding the suspicions of Mary A. Garvy, he was the actual purchaser of the property in question." The bill, however, charges the contrary to be the fact, and the demurrer admits the charge to be true.

He next contends that he (Tortoriello) occupied no fiduciary relation towards appellee. This may be true, but he is nevertheless accountable in equity for property which he received as the result of actively and knowingly assisting the agent, Baldino, to defraud his principal. (School Trustees v. Kirwin, 35 Ill. 73.)

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Both appellants contend that equity has no jurisdiction because there is no allegation in the bill that either is insolvent or financially irresponsible. Such an allegation is unnecessary where a violation of a trust and fraud are charged, and an accounting and injunction are sought. All these are recognized subjects of equity jurisdiction.

Appellants finally contend that by the decree, they have been deprived of their constitutional right of trial by jury. We have already held that a court of equity has jurisdiction, and a party is not entitled, as a matter of right, to a jury trial in chancery.

For the reasons stated, the decree of the superior court will be affirmed.

AFFIRMED.



19899

MATHILDA A. FORD,  
Appellee,

vs.

PERCY JAMES FORD,  
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUDGE FITCH

DELIVERED HIS OPINION OF THE COURT.

This is an appeal from a decree for separate maintenance. The contentions of the appellant may be briefly stated as follows: First, the court erred in refusing appellant's petition for a change of venue; second, the evidence fails to support the findings of the trial court to the effect that on or about December 9, 1918, appellant wilfully and without any reasonable cause deserted and abandoned appellee, and refused to live with her, and that ever since that time she has been, and is now, living separate and apart from her husband, without her fault; third, that the allowance for alimony is excessive.

First. The petition for a change of venue is copied into the record by the clerk, and is not embodied in, or made a part of, the certificate of evidence signed by the trial judge. For this reason, it is urged that the ruling of the trial court in denying the change of venue is not properly before us.

In Heacock v. Rosmer, 109 Ill. 245, it was said:

"In actions at law the general rule that a petition for change of venue does not become a part of the record unless made so by bill of exceptions, is not questioned or denied, but it is urged that the general rule has no application to chancery cases. We are unable to perceive any good reason why a petition for a change of venue should become a part of the record in a chancery case, in the absence of a certificate of evidence, when it does not in an action at law. \* \* \* A petition for a change of venue is a mere motion made in the case, and, like other motions, it does not become a part of the record unless preserved by certificate, properly signed by the presiding judge."

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In the later case of Flaherty v. McCormick, 123 Ill.

525, it was said (p.532):

"All oral motions in a chancery cause should be, and are supposed to be, noted upon the clerk's docket and a minute thereof made by the judge himself, and the motions, together with the orders made thereon, should be duly entered of record by the clerk in making up his orders in the case. By this means they become a matter of record, without the aid of a judge's certificate or bill of exceptions, as is required in a case at law. So where a motion is reduced to writing and filed in the cause, it is then as much a part of the record as anything else in it, and the setting it forth, therefore, in such a certificate, would add nothing to its force or validity. Indeed, the certificate of a judge as to what the motions and orders were in a chancery case, is just as inoperative and as much out of place as a statement in a bill of exceptions of the pleadings and the rulings of the court in respect to them would be in an action at law."

In Lange v. Hoyer, 195 Ill. 430, it was held that affidavits copied into the record by the clerk, and which, it was claimed, were read in support of a motion to set aside the decree, cannot be considered by the reviewing court unless made part of the record by certificate of evidence.

In Duquoin Water-Works Co. v. Parks, 1207 Ill. 43, the Supreme Court held that an affidavit filed in a chancery case, in support of a motion for continuance, did not become a part of the record, unless made so by a certificate of evidence, citing as authority for so holding, the cases of Heacock v. Hoerner, supra, and Lange v. Hoyer, supra.

The later cases seem to recognize a distinction between a motion and an affidavit filed in a chancery case. They follow the case of Heacock v. Hoerner, supra, to the extent that they place affidavits in the category of evidence, but they do not follow that case in holding that a motion is not part of the record in a chancery case unless made so by certificate of evidence. The statute requires a petition for a change of venue to "be verified by the affidavit of the applicant." The petition in the present case complies with the statute in this respect. The petition, therefore, partakes of the nature of both a motion and an affidavit. If it be



considered purely as a motion, the case of Flaherty v. McCormick, supra, would seem to support the view that when it was filed it became a part of the record without any certificate of evidence. But a motion or petition for a change of venue, if not sworn to, would be manifestly ineffectual. Hence no error can be assigned upon the ruling of a trial court regarding such a petition, except upon the assumption that the court treated and considered the petition as an affidavit, which, in fact, it is. When treated and considered as an affidavit, the ruling of the trial court is not saved for review, unless the petition is made part of the record by a certificate of evidence. Heacock v. Hoamer, supra; Lange v. Meyer, supra; DuQuoin Water-Works Co. v. Parks, supra. We are not unmindful of the fact that the generally accepted view among lawyers has been, and is, that all motions and affidavits in a chancery case, that are brought to the attention of the court and filed in the cause, become a part of the record without any bill of exceptions or certificate of evidence; but the cases last cited seem to hold that this view is wrong, so far, at least, as affidavits are concerned. It may, however, be added that in this case, the certificate of evidence shows that the evidence in chief of appellee's witnesses was taken at a date prior to the filing of the petition for a change of venue; that is, the petition was presented to the court after the trial of the case had been commenced. It is true that it appears that this evidence was heard at a time when appellant and his counsel were not present in court, but there is a statement by the trial judge in the certificate of evidence, that the case was regularly on his trial call. Therefore, even if the petition may be considered as properly a part of the record, it appears to have been presented too late, and for this reason, we think the court did not err in denying it.

Second. The bill charged not only that appellant deserted appellee without any reasonable cause, but also that he was guilty

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of adultery with certain persons named in the bill. The decree finds that the charges of adultery "are not sustained by the evidence, and are wholly untrue." / Appellant admitted that he had "left home" on December 9, 1912, and the evidence tends to prove that he left with the intention not to return. He testified that when he went away, <sup>he</sup> kept his key and told his wife that he "reserved the right to come and go as he pleased, that he wanted to come back once in a while, and that he would be back the following Sunday for his linen." We think this statement, as well as his subsequent conduct, shows very clearly his intention at that time to live somewhere else than at his own home. He testified further that the immediate cause of his leaving home in this manner was that his wife was continually "nagging" him, by accusing him, without cause, of improper relations with other women. Appellee testified, on the other hand, that for a long time before he left home, he was in the habit of remaining out at night until a late hour, and sometimes all night; that this habit had been the occasion of frequent quarrels between them; that on two occasions, more than five years prior to the filing of the bill, he had struck her during such quarrels; that these offenses had been forgiven, but that the offense was repeated one night about two weeks prior to the time he left home. Appellant admitted all this except the last offense. He denied that he struck appellee on the last occasion referred to, but admitted, on cross-examination, that he had "pushed her back on the pillow," and told her to "lie down and go to sleep." It would serve no useful purpose to recite in this opinion, all the details of these family quarrels. They were invariably caused by appellant's habits and his wife's suspicions. Her suspicions were natural enough, under the circumstances. His conduct called for explanations and not for acts of violence. With the witnesses before him, the chancellor has found that appellant's fault, and

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not appellee's, brought about the admitted separation, and we see no good reason to dissent from that conclusion. Upon the whole record we conclude that the decree is supported by the preponderance of the evidence.

Third. The court decreed that appellant should contribute \$30 a week toward the support of appellee and her minor son, and that she be allowed to remain in possession of the family homestead, a residence worth about \$9,000. It appears from the evidence that appellant's salary is \$100 a week and that he has other sources of income; that while the parties were living together, appellee received from him a regular allowance of \$35 a week for household expenses, and that when he left home, he made arrangements to pay his wife an allowance of \$25 a week. We think he has no just cause of complaint as to the amount awarded by the decree.

Finding no reversible error in the record, the decree of the Circuit Court will be affirmed.

AFFIRMED.



622 - 19927.

MARIE SCHLEHOFER and JOSEPH  
SCHLEHOFER,

Appellees,

vs.

UNITED STATES BREWING COMPANY OF  
CHICAGO, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

1091A. 170

MR. PRESIDING JUSTICE FITCH

DELIVERED HIS OPINION OF THE COURT.

*Continued from 1091A. 170*

Appellees are the owners of certain premises in Chicago, in which, for six years prior to the fall of 1910, they had conducted a saloon business. They were customers of the Bartholomae & Roesing Brewing & Malting Company. The president and vice-president of that company at that time were also president and vice-president, respectively, of the United States Brewing Company. One Philip Reisz was employed by the former company as a solicitor and collector, and called regularly on appellees at their place of business. In September, 1910, appellee, Joseph Schlehofer, told Reisz that he would like to go out of the saloon business. Reisz offered to buy his license, but Schlehofer replied that he would not sell the license unless he could rent the saloon premises at the same time. He told Reisz that he wanted \$2,000 for the license and \$40 a month rent for the saloon premises. Reisz said that he would "talk to Mr. Seitz about it." Seitz was the manager of the Bartholomae & Roesing Brewing & Malting Company, and also had charge of the collection of rents for the United States Brewing Company. After talking the matter over with Seitz, Reisz offered, on behalf of the Bartholomae & Roesing Brewing & Malting Company to pay \$1,500 for the license and to take a lease of the saloon for three years at \$37.50 per month. This offer was accepted by appellees. They went to the office of Mr. Seitz, where a written agreement was prepared by Seitz and signed by appellees. This agree-



ment is dated September 23, 1910, and recites that for the consideration of \$50 paid to appellees by the Bartholomae & Boesing Brewing & Malting Company, and the further payment of \$1450 to be paid on or before November 2, 1910, appellees agree to assign to Seitz "the right of reissue from and after this date, of city of Chicago saloon license No. 4283, issued for premises 2312 West 23th street, Chicago, Cook County, Illinois, for the period ending October 31, 1910." Then follows this further provision: "Also in consideration of the above sum of Fifty Dollars (\$50.00), we agree to lease to the said Brewing Company our building known as No. 2312 West 23th street, Chicago, Cook county, Illinois, for a period of three years commencing November 1, 1910, and ending October 31, 1913, at a rental of Thirty-seven Dollars and fifty cents (\$37.50) per month. Said lease to be in the form used by said Brewing Company and to contain a clause giving the said Brewing Company the option for a further term after the expiration thereof, of two years at the same rental." Seitz testified that after this agreement was signed, he verbally told the United States Brewing Company "what the man wanted;" that he "thinks" it was the president or vice-president he talked to; that a lease was then prepared in the "regular form used by the United States Brewing Company," and sent by that company to him (Seitz) to be executed. The lease thus prepared is dated September 23, 1910, names the appellees as lessor, and the United States Brewing Company as lessee, and demises the premises of appellees to that company for a three year term, beginning November 1, 1910, and ending October 31, 1913, at a monthly rental of \$37.50. Following the formal words of demise in the lease, are ten numbered, printed paragraphs. In a single line at the end of the fifth paragraph is printed the following sentence; "Said lessee has the right to cancel this lease at any time by giving the lessor thirty days' notice of its intention





so to do." This sentence has no relation to anything else contained in the fifth paragraph, and is very inconspicuous. The lease is printed in the English language. Appellees are Bohemians and cannot read English. Seitz knew that this cancellation clause, <sup>was</sup> in "the form used by the Brewing Company." Appellees did not know it. Seitz sent the lease thus prepared to Reisz, telling him to have it executed by appellees.

About the same time, one Radnitzer called upon Seitz, said he was an old friend of appellees, and had heard of the proposed sale, and threatened to "block the deal" unless he was paid a commission of \$100. Seitz, at first, demurred to this, but finally agreed to allow Radnitzer a credit of \$100 upon a bill he owed the Brewing Company, if the company secured the license. Thereupon Reisz and Radnitzer went together to appellees' place of business. There the lease was produced and appellees were asked to sign it. Appellees said that if Radnitzer said the lease was all right, they would sign it. Radnitzer told them it was all right, and they signed it, believing it was an ordinary lease for a term of three years. Thereupon, Reisz turned over to appellees two checks, aggregating \$1470, signed: "The Bartholomae & Roesing Brewing & Malting Co. John F. Seitz, Mgr.," took possession of appellees' premises under the lease thus obtained, remained in possession for six months, and then notified appellees that it had elected to cancel the lease under the thirty-days clause. This was the first knowledge appellees had of that clause. Thereupon, they filed their bill in the Superior Court, setting up these facts, in substance, and praying that the lease be reformed by striking out the cancellation clause. After a hearing before the chancellor, a decree was entered in accordance with the prayer of the bill, and from that decree this appeal is prosecuted.

Appellant contends that the evidence is insufficient to support the decree. It is insisted that in order to reform an

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instrument, it must be made to appear, by clear and satisfactory proof, that the parties actually agreed on a definite proposition, and that either through mutual mistake, or through a mistake on one side, coupled with fraud on the other, the agreement of the parties was not correctly reduced to writing; that there is no evidence that the appellant company (as distinguished from the Bartholomae & Roesing Brewing & Malting Co.) was a party to any of the negotiations leading up to the execution of the lease, and none to show that Seitz was its agent or authorized by it to make a lease in its behalf.

Conceding that this contention states, with substantial accuracy, the rule which obtains in cases where the reformation of a written contract is sought, we think the evidence demonstrates, very clearly and satisfactorily, that there was such a mistake on the part of appellees, and also such a mistake, or fraud, on the part of appellant's agents, as to entitle appellees to the decree that was entered. Seitz was the manager of one of these two closely associated brewing companies, and an employe of the other. His superiors were the same persons in both companies. As manager of one company, he negotiated, with the help of Reisz, the agreement of September 23, 1910. If, when he prepared that agreement, he knew that the "form of lease used" by the Bartholomae & Roesing Brewing & Malting Company contained the thirty-days cancellation clause, and intended to give appellees that kind of a lease instead of the ordinary kind in common use, then he was guilty of a deliberate fraud. There is no evidence, however, that such was the fact or that such was then his intention. In the absence of such evidence it must be assumed that when the agreement of September 23, 1910, was signed, he intended, and in fact agreed, on behalf of that company, to take from appellees an ordinary three-years lease such as would be naturally implied from the language of that



agreement. The lease that was, in fact, signed, was supposed by appellees to be the mere formal execution, or consummation of that agreement. They were led to believe that such was the fact by the conduct of Seitz, Reisz and Radnitzer, all of whom, at that time, were acting for and in behalf of appellant. If appellant likewise so supposed and intended, then the use of a form of lease which was so essentially different from the one agreed upon, was a mistake on its part, in which case the mistake was mutual. If appellant supposed and intended otherwise, it was guilty of fraud in procuring the execution of the lease, under the circumstances stated. In either view of the evidence, the decree was right. Appellant is estopped, in a court of equity, from asserting a defense which would, in effect, enable it to perpetrate a fraud upon appellees. In principle, this case is like Bergen v. Abey, 88 Ill. 269, and Keeley v. Sayles, 217 Ill. 589.

The decree of the Superior Court will be affirmed.

AFFIRMED.

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MIDLAND CASUALTY COMPANY,  
Appellant.

APPENDIX

DECEYON COURT

BOOK REVIEW

109 I.A. 486

STATEMENT OF THE CASE. Appellee recovered a judgment for \$300 in an action brought upon an accident insurance policy issued by appellant. The policy insured George H. Fischer, Jr., the son of appellee, against death by accident, and was made payable to appellee. While the policy was in force, the insured was accidentally killed by a collision between two motorcycles, one of which he was riding, at the intersection of 118th street and Stewart avenue, in Chicago. The deceased had owned and used a motorcycle for several months. About five o'clock in the afternoon of April 18, 1918, he started from his home in 118th street and rode east towards Stewart avenue, two or three blocks away. There were no other vehicles on the street. In approaching the intersection from the west, the view to the north along Stewart avenue is obstructed by a house at the northwest corner, built close up to the building line. At the same time the deceased was approaching this intersection from the west, a man named Efting, also on a motorcycle, was approaching it from the north on the west side of Stewart avenue. Efting did not see Fischer coming until they were within 20 feet of each other. He turned his motorcycle east to avoid a collision, but Fischer's motorcycle ran directly into Efting's, and both riders were thrown to the ground. Fischer struck his head on a curbstone, and received injuries from which he died the same night. There was evidence tending to prove that Fischer did not see Efting, nor look in his direction, at any time before the collision.





The policy provides that in case of the death of the insured by accident, three hundred dollars shall be paid to <sup>beneficiary</sup> appellee, except that in the event of injury, fatal or otherwise, "resulting, directly or indirectly, \* \* \* from exposure to obvious risk of injury or known danger, \* \* \* or while violating law, \* \* \* the limit of the company's liability shall be one-fifth of the amount that would be otherwise payable under this policy."

<sup>Appellant</sup> Appellant filed a special plea setting up these provisions of the policy as a defense to all but sixty dollars of the amount claimed, alleging that at the time the insured received the injuries resulting in his death, he was exposing himself to "obvious risk of injury or known danger," and was also "violating law," in this, that he was the owner of the motorcycle that he was riding at the time of the accident, and was then driving the same at an unlawful rate of speed and without having procured from the Secretary of State any certificate of registration or number, or number plate, as required by law.

MR. PRESIDING JUSTICE FITCH

DELIVERED THE OPINION OF THE COURT.

Appellant contends, first, that the evidence clearly shows that the death of the insured "resulted, directly or indirectly, from exposure to obvious risk of injury and to known danger;" second, that the court erred in refusing to admit in evidence certain printed registration lists purporting to be issued by the Secretary of State and found on file in the office of the County clerk; third, that the verdict and judgment should be set aside because of the remarks of appellee's counsel in his address to the jury. The question raised by the first contention is purely one of fact, and as we have concluded that we must reverse the judgment for other reasons, we refrain from expressing any opinion as to the weight of the evidence upon this point.

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As to the second contention, we think the ruling of the court in refusing to admit in evidence the printed registration lists found in the County clerk's office, was not prejudicial error, for the reason that if it had been conclusively shown that the insured did not have a registration certificate and a number plate such as the Motor Vehicle Act requires, there was not, and could not be, in the nature of things, any relation of cause and effect between such a violation of law and the injury sustained by the insured. The provision which limits the liability of the company to one-fifth of the amount otherwise payable applies, by its own terms, only when the injury results from the causes therein named. The phrase "while violating law" is one of such enumerated causes. Such clauses must receive a reasonable construction, and any uncertainty in the language employed must be construed most strongly against the insurance company. (Union Mutual Acc. Ass'n. v. Prohard, 134 Ill. 228).

We think the third contention must be sustained. The argument of appellee's counsel to the jury was without any legal excuse of justification. There was no evidence in the record that the insured was a member of the teamsters' union, ~~xxx~~ as counsel stated to the jury, and counsel must be held to know that such fact, if true, was irrelevant, incompetent and wholly immaterial under the issues in this case. The characterization of the supposed methods of insurance companies ~~has~~ generally, and especially the dramatic conclusion: "that is the game, gentlemen - that is the game that all of them play! Beat it!" were highly improper and obviously made for the purpose of exciting the sympathies or prejudices of the jury. This court, as well as the Supreme Court, has frequently held that no judgment can be permitted to stand where it is a matter of doubt, whether the verdict may have been affected by such inflammatory appeals. We think that is true in this case;



and for this reason, and this alone, the judgment of the Superior Court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.



NELLIE CARLIN, Administratrix of  
the Estate of HANS P. SCHMIDT,  
Deceased.

Appelles.

V3.

GRAND TRUNK WESTERN RAILWAY COMPANY,  
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

109IA.489

MR. PRESIDING JUDGE FITCH

DELIVERED THE OPINION OF THE COURT.

On October 12, 1907, appellee recovered a judgment against appellant in the Circuit Court of Cook County in an action on the case for wrongfully causing the death of Hans P. Schmidt. On December 22, 1909, this judgment was reversed and remanded by the Supreme Court, and on July 20, 1911, the mandate of the Supreme Court was filed in the Circuit Court. On the next day, an order was entered by the Circuit Court, on the petition of the attorney for appellee, and apparently without notice to appellant, that the cause "be reinstated and redocketed." No appearance was entered by appellant after the filing of such mandate, and so far as the record shows, no notice that the mandate had been filed or that the cause had been redocketed was ever served on appellant at any time. On February 19, 1913, the case came on for trial and was tried in appellant's absence and a verdict and judgment were rendered in favor of appellee for \$1875. This is an appeal from that judgment.

Section 113 of the Practice Act provides that when any cause is remanded by the Supreme Court, that Court shall issue its mandate directly to the trial court, and upon the filing of a transcript of the order remanding the cause, "and not less than ten days notice thereof being given to the adverse party or his attorney," the cause shall be reinstated in the trial court.





Section 114 of the same Act provides that if neither party shall file such transcript within two years from the date of the final order of the Supreme Court, "the cause shall be considered as abandoned, and no further action shall be had therein."

In this case, a transcript of the order of the Supreme Court was filed in the Circuit Court within two years of the date of the judgment of the Supreme Court, but the cause was re-arrested and afterwards tried without the statutory ten-days notice being given to appellant or its attorney. By the filing of the transcript, the Circuit Court obtained jurisdiction of the subject matter of the cause, but did not obtain jurisdiction of the person of appellant. Until the statutory ten-days notice was given to appellant or its attorney, the Circuit Court could not proceed with the trial, and to do so was error necessitating a reversal of the judgment. (Snell v. Weldon, 243 Ill. 496, 516; Austin v. Dufour, et al., 119 Ill. 85.)

Appellee's counsel filed no brief in this case. After the time for filing such briefs had expired, appellant's counsel obtained leave to file an additional statement of points and authorities, in which they insist that the judgment should be reversed without remanding. Their claim is that the Circuit Court was wholly without jurisdiction, and that it cannot now acquire jurisdiction because the two years mentioned in Section 114 of the Practice Act has expired. But the transcript was filed within two years. The notice required by Section 113 was not given, but the statute does not require such notice to be given within any specified time. The notice is like a new summons. Until served for ten days, the court acquires no jurisdiction over appellant. In the absence of such service, the court cannot try the case, although it has jurisdiction of the subject matter. It is urged that if appellee now has the right to serve the statutory notice, and thereby compel appellant



to go to trial so long after filing the mandate, this would enable appellee "to obtain a decided advantage over appellant, after its witnesses have become scattered and its evidence has passed beyond its control." The obvious answer to this is that it was in the power of appellant to deprive appellee of this alleged advantage, by entering its appearance so that a trial on the merits could be had. Appellant knew the mandate had been filed when it prayed for an appeal from the judgment. That was in March, 1913.

For the reasons stated, the judgment of the Circuit Court will be reversed and the cause remanded.

REVERSED AND REMANDED.



FRANK J. SENDE,  
Appellee,

vs.

MICHAEL ZIMMER, Sheriff, ELI  
S. WARNER, AUGUST F. OSTERLIND,  
LOUIS BECKER and OSTERLIND-FORD  
COMPANY, a Corporation.

ELI S. WARNER,  
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

139 I.A. 490

MR. PRESIDENT JUSTICE MITCH

DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory injunctional order of the Circuit Court, restraining the sheriff of Cook County and the appellant Warner, until the further order of the court, from proceeding to enforce payment of a judgment obtained by Warner against the Osterlind-Ford Company, an Illinois corporation, out of certain personal property claimed by appellee which was levied on by the sheriff.

The injunction was issued upon motion of appellee, based solely upon the verified bill of complaint, after notice to the sheriff and appellant, who were represented by counsel. No counter-affidavits were filed. No answer to the bill had been filed at the time the motion was heard and the preliminary injunction issued. The writ was ordered to issue upon the filing of a bond by appellee in the sum of \$3,000, and such a bond was filed.

The bill states in substance, that appellee is, and has been for twelve years, engaged in the printing and engraving business in Chicago; that on August 11, 1913, he purchased sundry printing presses and other machinery, type, fixtures, and apparatus used in connection with a printing establishment, from August



F. Osterlind for the sum of \$10,000, paying \$1,000 in cash, assuming the payment of certain notes of the Osterlind-Ford Company, amounting to \$3,435, secured by chattel mortgage on the property, and giving his four notes for the balance, payable respectively in two, three, four and five years after the date thereof, these last mentioned notes being guaranteed by the Chicago Engraving Co., an Illinois corporation of which appellee was the principal owner; that Osterlind acquired his title to such property by a bill of sale dated July 25, 1913, from the Osterlind-Ford Company, after which date he (Osterlind) was in actual possession thereof and conducted in his own name and as his own business the printing business theretofore conducted by the Osterlind-Ford Company; that appellee at once took possession of the property so purchased from Osterlind, and used the same in connection with his (appellee's) printing business, to which he gave the name of "Winchell Press;" that he expended large sums of money in equipping the printing plant and business of the "Winchell Press," and in advertising the same; that he paid \$1,000 upon the notes he had given for the purchase price thereof, and \$1,935 upon the chattel mortgage notes, and paid the interest thereon; that he had also done work for Osterlind, and advanced moneys to him, amounting to \$1,011.82, making his total outlay on account of the property purchased from Osterlind, a sum in excess of \$10,000; that after the purchase of the property, appellee gave a large amount of time to building up his printing business, and entered into contracts for printing aggregating \$9,000; that any interruption of this business will subject him to irreparable loss; that on May 19, 1914, Osterlind, Warner, and one Becker entered into a conspiracy to defraud appellee out of the property he had thus acquired; that in pursuance of such conspiracy, they caused a judgment note to be executed in the name of the Osterlind-Ford





Company, by said Osterlind as president, for \$11,400, which note was dated June 24, 1913 (although in fact signed on May 19, 1914), and was made payable to the order of appellant Warner on demand; that neither at the time said note was executed, nor on the date it purports to have been made, nor at any other time, was the Osterlind-Ford Company indebted to Warner in any sum whatsoever; that said Osterlind-Ford Company wound up its affairs as a corporation on July 25, 1913, when it made the sale of the property in question to Osterlind, and that its charter was surrendered on August 15, 1914; that at the time said note was in fact executed, viz: May 19, 1914, the Osterlind-Ford Company did not exist as a corporation, and that the defendant Osterlind had no power or authority to use its name in giving a note nor to acknowledge any indebtedness in its behalf; that in further pursuance of said conspiracy, appellant Warner, on the next day after he received said judgment note, caused a judgment by confession to be entered upon the same in the Superior Court for \$12,810.30, and caused an execution to be issued and delivered to the sheriff and caused the sheriff to levy upon the printing presses and other property which appellee had bought from Osterlind as above stated; that the sheriff placed a custodian in charge of the same and threatened to sell it as the property of the Osterlind-Ford Company to satisfy appellant's pretended and fraudulent judgment; that appellee thereupon notified the sheriff that he claimed title to the property, whereupon the sheriff began a proceeding in the County Court of Cook County to try the right of property, which proceeding was pending at the time the bill was filed; that notwithstanding the pendency of the latter proceeding, appellant Warner notified the sheriff to remove the articles levied upon, and that the sheriff threatened to carry out the order of Warner and remove the property; that appellee fears that unless restrained by injunction, the sheriff will carry out



his threats and thereby prevent the complainant from continuing his business, executing his uncompleted contracts, and otherwise cause him irreparable injury and damage: that Warner and Osterlind are non-residents of Illinois; that said conspiracy was entered into, and said fraudulent note was executed and confessed in the manner above stated, in order to make it appear that at the time the Osterlind-Ford Company sold the property to Osterlind, appellant Warner was a creditor of that company, and that such property was sold in bulk without complying with the provisions of the so-called "Bulk Sales Act" of 1913, when, in fact, said Warner was not a creditor of that company and not entitled to any notice under the Bulk Sales Act, nor entitled to question the validity of the sale from the Osterlind-Ford Company to Osterlind, nor the subsequent sale from Osterlind to appellee.

Appellant contends that, admitting the truth of all these allegations, the bill shows upon its face that appellee has a complete, full and adequate remedy at law. It is insisted that appellee has such a remedy in either of three ways, viz: first, by a trial of the right of property in the County Court; second, by a suit in trespass; and third, by an action of replevin. The proceeding for the trial of the right of property is a purely statutory proceeding, and does not, in any event, oust a court of equity of jurisdiction. (McNabb v. Heald, 41 Ill. 323.) In an action of trespass appellee might be able to recover damages for a wrongful seizure of his goods, but that action would afford him no remedy for the consequent injury to his business and his loss of prospective profits. As to the remedy by action of replevin, we were at first bluish inclined to agree with appellant that such an action would afford a complete and adequate remedy to appellee, but on further consideration, we are impelled to the conclusion that there are such practical difficulties in the way of complete relief in a proceeding of that character as to eliminate it, also, from the list of possible



remedies. Sales made in violation of the Bulk Sales Act of 1913 are not void, but only voidable<sup>as</sup> to creditors. If appellee brought a suit in replevin, the appellant Warner would undoubtedly seek to show, by his pleadings and proof, that the title which appellee acquired by his purchase from Osterlind was not a good title for the reason that the original sale to Osterlind was made in violation of the "Bulk Sales Act" of 1913, and appellee would reply that Warner was not a creditor of the Osterlind-Ford Company, and therefore not entitled to attack the sale to Osterlind. The determination of the question whether Warner was a bona fide creditor of the Osterlind-Ford Company at the time the sale was made to Osterlind would thus be the real issue in the suit, and that question would involve an examination of the business transactions between the company and Warner giving rise to the alleged indebtedness of the former to the latter. This examination would doubtless require the production of the company's books. As that company would not be a party to the replevin suit, it could not be compelled in that suit to produce its books for examination and inspection, except by the process of subpoena duces tecum, and that process would<sup>probably</sup> be ineffectual because, as appears from the allegations of the bill of complaint, the company has ceased doing business and surrendered its charter, and its president, Osterlind, who signed the judgment note, is no longer a resident of the State of Illinois. On the other hand, both Osterlind and the Osterlind-Ford Company are parties to the equity proceeding and are amenable to its process as such parties, so far, at least, as the property in possession of the sheriff is concerned. Furthermore, the injunction granted is not a final injunction, but only preliminary. Its sole purpose and effect is to preserve the status quo. No harm, other than a slight delay, can come to the appellant if his judgment was in fact confessed for a bona fide debt due. Great



harm, amounting to irreparable injury, would ensue to appellee if the allegations of his bill are true and no injunction were issued. If, upon the filing of the answer, or afterwards, it shall be made to appear that the real issue (of fraud in securing a judgment without any indebtedness) can be as well tried in a replevin suit as in a court of equity, and that the relief obtainable in a court of law will be as complete and efficient as in a court of equity, it will then be time enough for the court to so find and adjudge.

It is also urged that the bond required to be filed was not such a bond as is required by the statute. We think there is no merit in this contention. The preliminary injunction does not prevent the collection of appellant's judgment by any proper means. It merely prevents the sheriff from proceeding further with a levy made upon certain specific property, which, upon the face of the bill, appears to be the property of appellee and not that of the execution debtor.

That we have said covers, we think, the substance of all the errors assigned that have been discussed by counsel. Finding no reversible error the order of the Circuit Court will be affirmed.

AFFIRMED.

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JOSEPH FISHER,  
Appellee,

vs.

CHICAGO CITY RAILWAY COM-  
PANY,  
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

109 I.A. 492

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

Joseph Fisher, the appellee, hereinafter referred to as the plaintiff, recovered a judgment against the Chicago City Railway Company, the appellant, hereinafter referred to as the defendant, for \$200 in an action on the case.

The contention of the plaintiff in this case is, that he and his five year old daughter became passengers of a north-bound Halsted street car, at which time the plaintiff was carrying a suit case; that his place of destination was 14th place; and that before reaching that place, he signalled the conductor to stop, and that the conductor did stop the car at that place; and that while in the act of alighting, and while he was still on the car reaching for his daughter, the car suddenly started and he himself was thrown to the ground, leaving his child upon the street car; that the car continued on, and that he afterwards was assisted to the place where the car stopped, his daughter handed down to him, and he was afterwards taken home. In this plaintiff is supported by another witness, who corroborated him as to how the accident occurred.

Defendant's contention was that the plaintiff was standing on the platform of the car, and that somewhere between 15th street and 14th place, the plaintiff jumped from the car while in motion, and fell to the ground. The conductor of the car corroborated plaintiff in that plaintiff told him at 15th street to stop at 14th

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place. The conductor then testified that while the car was going at the rate of from fifteen to twenty miles per hour between those streets, the plaintiff either stepped or fell off the car, and at that time the child was on the platform. Two other witnesses testified as to the man's either falling or stepping off the car while in motion, between the designated places.

The jury, by their verdict of guilty, evidently were of the opinion that the plaintiff, having the care of his child of five and one-half years, and burdened with a suit case, was not likely to step or fall off a car moving at the rate of fifteen to twenty miles per hour midway between intersections, after having notified the conductor at one corner that he wished to stop at the next corner. Defendant evidently realized that situation, as shown by the admission in its brief, wherein it says that while it cannot contend that the verdict of the jury is clearly and manifestly against the weight of the evidence, as far as the question as to how the accident occurred is concerned, it based its contention for a reversal of the judgment on this appeal, upon the following grounds:

(1) That the court erred in the admission of evidence by the plaintiff's doctor; (2) because the court erred in giving and refusing certain instructions; and (3) that the damages awarded are excessive.

In arguing the question of error of the court in ruling on the testimony, the defendant confines its objections to three questions asked on redirect examination of the attending physician by the attorney for the plaintiff.

A careful review of the testimony of the physician shows that the counsel for defendant subjected the witness to a lengthy cross-examination wherein he clearly distinguished between objective and subjective symptoms; and this distinction as it applied to the condition of the plaintiff was clearly developed.



The questions complained of on this appeal were general and did not apply particularly to the plaintiff, except in one instance, and there the plaintiff might have been considered simply a general subject. While they may have been objectionable as to form, yet the substance, we believe, was proper. There was nothing in these questions which permitted the jury to speculate as to the character of the injuries, because they had clearly before them the testimony of the plaintiff and the doctor, as to what the injuries were, and what the condition of the plaintiff was.

The authorities cited by counsel upon that point do not apply to the case at bar.

Defendant makes complaint of error in the giving and refusing of instructions by the court. It complains first, of the seventh instruction given on behalf of the plaintiff, which is as follows:

"The court instructs the jury that the defendant is required to use all reasonable means, care and vigilance, in view of the character and modes of conveyance adopted by it, to prevent injury to passengers, and while said company is not an insurer of absolute safe carriage to its passengers, yet it is held to exercise the highest degree of care, skill and diligence practically consistent with the operation of its road."

It contends that the word "practically" as used in the foregoing instruction, governs the word "consistent" and not the word "operation." Defendant admits, however, that it gave an instruction covering the same subject matter, wherein the law is correctly stated. It cannot complain of this instruction unless it misled the jury. We do not believe it did. On the contrary, we believe that any jury would not distinguish between the two instructions, but would consider them identical and merely repetition by the court of the principle therein announced.

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Defendant directs our attention to the case of Kadner v. C. C. Ry. Co., 202 Ill. 139. This case involves an instruction entirely different from the one at bar: it being as follows: "The law requires that a common carrier of passengers should exercise extraordinary care in the carrying of passengers." In no way does this case support the contention of defendant in the case at bar.

Defendant complains of the refusal of the court below to give the first instruction offered on its behalf. Under the declaration and the evidence in the case, the giving of this instruction would have been error. Instruction No. 12 given on behalf of the defendant, in relation to the subject matter announced the correct principle of law as applicable to the facts in the case at bar.

The second instruction offered by defendant, we believe, was properly refused. In the first place, the instruction assumes that what occurred was unusual; and, secondly, there was nothing in the facts which made the principle of law contended for in this instruction applicable.

This brings us to the question of damages. In its contention that they are excessive, defendant relies upon the variance in the testimony of the physician and the plaintiff. There is no question that this man fell from the street car. He did sustain an injury. As to how it affected him with reference to his ability to work, the plaintiff's testimony stands alone. The attending doctor corroborates plaintiff with reference to the fact as to complaints made by plaintiff as to his condition. The amount of the damages is peculiarly within the province of the jury, and we cannot say that under the evidence the amount is excessive.

Finding no reversible error, the judgment of the Superior Court will be affirmed.

AFFIRMED.





S. MAEDER,  
Appellee,

vs.

MARY E. STEPHENS and LEROY  
HANNA,  
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

189 I.A. 494

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

S. Maeder, who is a widow, charged Mary E. Stephens and Leroy Hanna with entering into a conspiracy to accuse her of the crimes of disorderly conduct and larceny, for the purpose of extorting from her certain letters written and mailed to her by the said Stephens, which she claimed as her property. He charges that the acts of the said defendants constituting this conspiracy, were in violation of sections 46 and 93 of the Criminal Code, chapter 38, R. S. of Illinois; and for the damages that she sustained by reason of the acts complained of, she instituted her cause of action on the case, on October 2, 1906, in the Circuit Court of Cook County, against the said Mary E. Stephens and Leroy Hanna. Hereafter in the opinion the said S. Maeder will be referred to as the plaintiff, and Mary E. Stephens and Leroy Hanna will be referred to as the defendants.

On the trial below, the jury found the defendants guilty, and assessed the damages of the plaintiff in the sum of \$5,000. Judgment was entered on the said verdict, from which this appeal is prosecuted.

The plaintiff, in the fall of 1907, was employed selling ladies' garments for the Mathews Suit Company. Leroy Hanna, one of the defendants, was in the business of buying and selling cattle at the stock yards in the city of Chicago. The other defendant, Mary E. Stephens, was at this time a farmer, living in McLean County, near Lexington, Illinois.



The defendants had been friends for many years, and had business dealings with each other. At the time of the trial, Stephens was residing in Bloomington, Illinois.

The only testimony offered in support of the contention of the plaintiff in this case was that of the plaintiff herself. She stated that in the fall of 1907, while employed by the Mathews Suit Company, she received a telephone message to come to the home of a Mrs. Borst, then living at 3107 Rhodes avenue; that when she arrived there, she met Mrs. Borst and Mr. Hanna, both of whom she knew; that she was introduced by Hanna to a Mr. Stephens; that after spending the evening there, Stephens took her home; that on the next day Stephens called at her apartment and spent the afternoon and evening with her; that thereafter, at frequent intervals Mr. Stephens would come to the city and at such times spend practically all the afternoons and evenings with her, either at her apartment, or taking her to the theatre. That at times he would remain in the city a week or ten days; at other times only two or three days; that she thought him to be a bachelor, and that several months after their meeting he talked marriage to her; that during the year following she received many letters from Stephens; that these letters were couched in endearing terms and were of a rather intimate character. One of the letters, which is a fair<sup>ly</sup> typical<sup>ly</sup> of the~~xxxxxx~~ all, is as follows:

"My dear Sweetheart:

I just happened to come to Bloomington this evening and it is now 9:30, but thought I must write to you. I wrote you this morning at Lexington. I am going to call you up tomorrow and talk to you. I have been very busy since I last saw you. Dear, it is going to be impossible for me to help you this spring, for I have not got money enough to pay my debts. I know that you will not think hard of me because I have done my best for you. When I get able to help you I will surely do it. I thought that I had more money in the bank than I have. I went to the bank this morning to see how much money I have, and I have just forty dollars. I like to fell down for I thought I had three hundred dollars there, but I am going to send you some of the forty dollars. Now, dearest, I am telling you the truth, and you will always find me that way. Don't get discouraged, for you can just count on me.

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Just feel - when I get some money - for, you know that I am not stingy, for I always love to give you money when I have it.

Yours lovingly."

that during that period she frequently received money from him, - sometimes ten, fifteen and twenty dollars enclosed in letters; that on many of his visits he gave her money; that he occasionally purchased wearing apparel for her; that sometime in November, 1908, she was visited at her home by the two defendants who asked her for the return of the letters that had been written her by Stephens; that she replied that they were hers and refused to turn them over; that Hanna stated that they would cause her to be arrested, and that she would not have any reputation left; that Hanna took her by the shoulder and arm, and shook her, and used violent language; that after this happened, Stephens said she would get into serious trouble if she continued acting as she did; that otherwise Stephens didn't say very much; that she thereafter felt sick and had palpitation of the heart; that for about a month she did not return to work; that in December, towards the end of the month, defendants again visited her and told her again they had come for the purpose of getting the letters, and that they again stated to her they would cause her trouble; and that she would be arrested, and that when she asked what for, they answered it would be for disorderly conduct and larceny - that holding of these letters constituted stealing; that these statements were made by Hanna while Stephens stood by; and that Hanna again took hold of her arm roughly; that after they left, she became very much frightened and became nervous and ill, and could not continue with her work; that she had been accustomed to earning, during that period, about \$25 per week at the Mathews Suit Company; that in March, 1909, she herself went to Bloomington to see Stephens; that Stephens would not see her, but ran away from her when he saw her; that afterwards Mr. Fleming, attorney for Stephens, and Hanna, called on her at her



home during March, but that she refused to talk to Fleming; that in October, 1909, this suit was begun.

Plaintiff testified further that in December, 1908, she did return some letters to Stephens; that during the same month she received from a Mr. Crabtree the sum of \$50, which was sent by Mr. Stephens, and also \$450 from Stephens, through Hanna. Her explanation for the receipt of the \$500 was, that she had been talking to Stephens about doing something for her, and that she thought she might be able to run a hotel, and that he gave her \$500 towards that, and that perhaps later he would give her more money for that purpose. All the letters remaining in her possession at the time of the trial were admitted in evidence.

Defendants entered categorical denials to nearly all of the testimony of the plaintiff. Both of the defendants testified that the occasion of Stephens' meeting Mrs. Maeder was by telephone message, and was at the home of Mrs. Borst. The only point of difference in the testimony as to their meeting was, that plaintiff testified that she was telephoned for by Hanna, while defendants testified that Hanna and Stephens had come to the apartment of Mrs. Borst, and that Mrs. Borst telephoned for plaintiff to come and meet Stephens.

The defendants also contend that it was immediately made known to Mrs. Maeder, the plaintiff, that Stephens was married. This, however, is denied by plaintiff, who says she did not hear definitely that Stephens was married until during March, 1909.

The testimony of the two defendants and Mrs. Borst was, that after meeting Mrs. Maeder, and after some conversation, the plaintiff and Stephens retired to a bedroom in the home of Mrs. Borst and remained there for some time; defendant Hanna leaving before they did. Stephens admits that he frequently saw plaintiff on his visits to the city; admits having written the letters introduced in evidence, and the others that had been returned to

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Hanna; he further testified that during the entire period they sustained an illicit relationship; he admitted having frequently given her money.

Stephens testified that during the summer of 1908, after June, he stopped coming to Chicago and no longer wrote plaintiff, or sent her any money; Hanna testified that during that period the plaintiff came to him and complained of Stephens' attitude, ~~xxxx~~ and stated that by reason of her having taken up with Stephens she gave up other friends; that she knew Stephens was married, and intended to make trouble for him by making known her relationship with him to his family; that these threats were made frequently by plaintiff.

Both of the defendants testified that they did go to the home of the plaintiff to secure, if possible, the return of the letters, and were willing to pay her to secure the return thereof.

Stephens claims he was there only once, and that the further conversations leading to the payment of a certain sum of money were had with Hanna. Hanna testifies that afterwards he paid plaintiff the sum of \$500, and that before paying that money he received from her, as she said, all the letters which she had in her possession; that he asked her for a receipt for the money so paid, and a release of all claims of any kind; that she refused to give a receipt, saying that her attorney advised her not to do so; that the \$500 was paid for buying for Stephen's peace from Mrs. Maeder, the plaintiff.

Both defendants deny categorically that they threatened Mrs. Maeder with arrest, or stated to her that they would injure her reputation; denied that they intended charging her with disorderly conduct and larceny; and both denied that either one of them ever laid a threatening hand upon her at any time that they met her, either together or alone.

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In urging a reversal of the case, defendants claim that no cause of action is set forth in plaintiff's declaration upon which the case went to trial; furthermore, that the court erred in refusing to instruct the jury to find for the defendants, both at the close of plaintiff's evidence and at the close of all the evidence; that the court erred in the giving of instructions on behalf of the plaintiff and the refusing of certain ones on behalf of the defendants; and because the verdict is contrary to the weight of the evidence.

We have reviewed the bill of exceptions carefully, but do not find any exceptions preserved to the instructions given on behalf of the plaintiff; moreover, while defendants offered motions at the close of the plaintiff's case, and at the close of all the evidence, to instruct the jury to find for the defendants, yet apart from the motions to instruct for the defendants, the bill of exceptions shows no written instruction to that effect having been tendered to the court.

The only question for review that defendant has preserved in his record is the error of the court in refusing to grant their motion for a new trial because the verdict was clearly and manifestly against the weight of the evidence.

While we have already given the plaintiff's and defendants' contentions in considerable detail, yet, in determining the question whether or not the verdict was manifestly and clearly against the weight of the evidence, there are several circumstances brought out in the evidence which clear the way for our decision.

The plaintiff stands alone in her testimony. With reference to the acts of the defendants complained of, she is not corroborated by the documentary evidence; on the contrary, we believe it is inconsistent with plaintiff's contention. With reference to her physical condition, which plaintiff alleges to have been



the result of the acts of the defendants, although she claims to have been attended by a physician, such physician was not called to testify. The circumstances of her meeting Stephens, and what took place, were contradicted by three witnesses. The acts charged against the defendants which constituted the basis of this action were categorically denied by the defendants. While plaintiff insisted that there was no connection between the return of the letters and the payment of the \$500, yet it is a striking coincidence that the letters were turned over at about the time this money was paid; and this fact is admitted by the plaintiff herself.

Her explanation of the payment of this \$500 to her is not satisfactory to this court. That two men should, within a period of thirty days, come to her home twice, threaten her with arrest for disorderly conduct and larceny, handle her roughly, use violent language, threaten to blacken her reputation, and within a few days after the second visit, that the defendant Stephens should give her \$500 towards the purchase of a hotel, and for no other purpose, seems to us highly improbable. Moreover, on cross-examination, plaintiff testified that when she gave these letters to Hanna, the one defendant, she stated it was her intention to deliver up all of the letters in her possession at that time. The production of the letters in evidence indicates she failed to do so, and Hanna testified afterwards that she claimed to have kept the best letters, and threatened to use them unless she received additional money.

After that, plaintiff visited Bloomington to see Stephens, who refused to see her. No more money was paid plaintiff after this \$500. In October she brought this suit: following which plaintiff again began writing letters to Stephens, and on April 28th we find a most remarkable letter written to Stephens: it reads as follows:

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"Chicago, 4/23/10.

Dear Mr. Stephens: I have just received a very distressing letter from my sister in Denver, saying my mother is quite ill, and as she is 73 years of age, this may be serious. They wish me to come there. I would like to go but, dearie, I have not the clothes or the money at the present moment. You know you always told me, under no circumstances could you see me distressed. You could not be happy if you knew it, and I know of no reason why I should not let you know that I want to see you. You always did what I asked you heretofore. If you prefer that I meet you in Bloomington one day next week, I will do so. If you would rather come here, very well, I will enclose my 'phone number. You can long-distance me, or let me hear in any way that suits you best, but of course I want to hear. Somehow or other, this little letter should be strictly between ourselves, but I suppose you will rush away with it for profound legal advice. Well, let me tell you that not a lawyer in Illinois can tell you what is in my head. You are the only man I am going to tell it to, and then I intend to whisper it if you get close enough - - - you and I know some things that lawyers or nobody else knows - - - but I am not going to write it down here either, for the benefit or detriment of any one. You understand, and you wouldn't want me to. Now, what is the use of being idiotic with me? Why don't you come and see me? Both the children, Alpha and Sam, are in New York, and have been ~~there~~ for over a year. I am quite alone here, and want to go and see my mother, but it is quite impossible, as at present moment.

Yours truly,  
Fannie M.,  
4306 Calumet Avenue, 'phone 4420 Oakland."

At one point during her cross-examination, plaintiff denied having written this letter or having ever asked defendant Stephens to come and see her after this suit was started. Her only explanation of the letter was that it was written under the stress of the circumstances therein stated. There are many expressions in that letter which are not associated with the stress of circumstances and cannot be accounted for by that explanation. We regard this letter as corroborative of the contention of the defendants in this case, as to the character of the relationship that existed between plaintiff and Stephens, and defendant's version of the circumstances that led to this action.

While the preponderance of evidence is not <sup>necessarily</sup> determined by the number of witnesses testifying on either side of the case, yet in this case that circumstance must be considered by this court an important factor.





We have carefully considered the evidence in this case, and are firmly of the opinion that the preponderance and weight of the evidence are unquestionably with the defendants, and that the verdict of the jury was clearly and manifestly against the weight of the evidence.

In the case of Dunelson v. S. St. L. Ry. Co., 235 Ill. 325, Chief Justice Carterright, speaking for the court, said:

"The constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of evidence, and if a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed."

We have already stated that in our opinion the verdict of the jury is clearly and manifestly against the weight of the evidence, and therefore, under the principle announced in the case of Dunelson v. S. St. L. Ry. Co., supra, the court should have granted the motion of the defendants for a new trial. His failure to do so constituted such error for which the case must be reversed and remanded.

The defendants in their brief have asked this court for a reversal with a finding of facts against the plaintiff. We cannot, however, pass upon that question because defendants have failed to properly preserve it for review.

For the reasons hereinabove assigned, the case will be reversed and remanded.

REVERSED AND REMANDED.



457 - 19840.

19860

JONATHAN ADE,

Appellee,

vs.

BERTHA ADE, et al.,

*Ade* Appellants.

) APPEAL FROM

) SUPERIOR COURT

) COOK COUNTY.

1991A.501

MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

A judgment for \$225.86 and costs was entered in favor of appellee, in a suit brought in the Municipal Court of Chicago by appellee against Bertha Ade, one of the defendants herein. A creditor's bill, based on this judgment, was filed by Jonathan Ade against Bertha Ade, the principal defendant, and William H. Ade, Hazel Ade, the wife of William H., and Theodore J. Ade. Answers were filed by the defendants whose names were mentioned in the creditor's bill, and upon issue being joined, the case was referred to a master. The master found in favor of the complainant, and against all the defendants; upon which finding the court entered a decree confirming the findings of the master, from which decree this appeal has been prosecuted.

The note upon which judgment was entered in the Municipal Court reads as follows:

"Chicago, March 1st, 1896.

Herewith Jonathan T. Ade and Bertha Ade declare that we are indebted to our son, Jonathan G. Ade in the sum of \$113.33, which is due him from the estate of his deceased brother Emanuel G. Ade, which sum he may draw in small amounts out of the business, or after the death of the father, demand it from the mother, Bertha Ade, or from the administrator of the estate, if there should be any. However, the interest at 3% on said sum shall be paid yearly.

Signed. John T. Ade,  
Bertha Ade."

John T. Ade, one of the signers of the foregoing note, had been married three times. There were no children as a result of the first marriage; but as a result of the second marriage, there were six children, namely: Steven F., Martha, Daniel, Emanuel, Samuel and Jonathan T. Ade; the last named being the



complainant herein. As a result of the third marriage, namely, with the principal defendant in this case, there were three children, two of whom were William H. and Theodore J. Ade, also defendants in this action.

Prior to the giving of the note hereinabove set forth, Emanuel Ade, <sup>one</sup> of the children by the second marriage, died, leaving some insurance and personal property. Samuel Ade, a brother, was appointed administrator of Emanuel's estate and collected the insurance and turned the personal property into money. A division of the estate entitled each of his brothers and sister, namely, the children of John H. Ade and his second wife, to the sum of \$116.30. Samuel Ade, instead of turning over this money to the brothers and sister of the deceased Emanuel Ade, used this money in establishing a drug store, which was operated in his name, and in which another brother, Steven H., was employed. To evidence the indebtedness due the brothers and sister, a series of notes was executed by John H. and Bertha Ade, the principal defendant, to the various children, for \$116.30 each, among which was the note hereinabove set forth, on which a judgment was secured in the Municipal Court, and which has been made the basis of these proceedings. This drug store was afterwards transferred to the father, John H. Ade, and Steven H. Ade continued as an employee in charge of the store.

In 1887 Samuel Ade, who had acted as administrator, and in whose name the drug store had been operated, became involved in some difficulties in which criminal prosecution was threatened. In order to relieve this situation J. H. Ade, the father, and his wife Bertha Ade, executed a mortgage upon the homestead located at No. 183 West Diversey street, the title to which was originally in John H. Ade, but in December, 1889, it was by mesne conveyances transferred to Bertha Ade, the wife. The money raised upon this mortgage was used in behalf of the son Samuel Ade. A year or so later, viz:

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about 1900, the son Samuel was again in trouble, and an additional mortgage for \$300 was placed on the homestead.

About 1901 Steven F. Ade, who had been in charge of the drug store, insisted that the store be turned over to him in payment of back salary due him. As a result of an agreement made between Steven F. Ade and the father, John G. Ade, the store was turned over to the former. As part of the agreement, Steven F. Ade also promised to pay the premiums upon the two life insurance policies of \$1000 each, which the father carried in the German Mutual Benefit Association; pay the balance due on any of the notes that had been given at the time the drug store was established; and also to pay \$5 weekly for the support of the father and his wife.

At the time this agreement was entered into, there were living with John G. and Bertha Ade, Jonathan G., the complainant herein, William H., Theodore J., and a younger brother Fred; also a man by the name of Beck, who boarded and roomed there. About two months after the transfer of the store to Steven F. Ade, the father, in the presence of his wife Bertha, stated to William H. and Theodore J. Ade, his sons by the last marriage, that Stephen F. Ade had not kept his promise; that they were without means of support, and that he depended entirely upon the two defendants.

At this time both of the defendants were employed and earning moderate but substantial salaries. William H. Ade was about 31 years of age, and the younger brother, Theodore J., several years his junior. Wm. H. then said to his father that they would take care of both his mother and father, provide for their support, pay any expenses necessary for the maintenance of the household, including the care of the property, and protect the life insurance; but that they should be reimbursed to the extent of the amount advanced, with moneys realized from the house or the life insurance policies; that it was agreed by the father at that time, that in





consideration of the boys' carrying out this agreement, that either at the death of the mother and father they would receive the property or the life insurance, or at such time as the money advanced by the boys should equal the value of the homestead and the policies of life insurance.

Shortly after this agreement was entered into, Jonathan complainant, G. Ade, married and moved away, and within a year the boarder, Mr. Beck, left. From that time on, the defendants William H. and Theodore J. Ade paid the entire expenses of the household, whatever personal expenses were necessary for the mother and father, such as clothing, medicines, drugs and personal spending money; all taxes levied on the property, including real estate taxes, water taxes and special assessments; the fire insurance on the property, also the insurance premiums on the life insurance policies; necessary repairs on the house; the \$300 and the \$340 mortgages that had been placed upon the property at the time Samuel Ade was in difficulties; bills for attorney's fees that mother and father had incurred therein; the price of the family burial lot at the time of the death of the father, John H. Ade, which occurred in February, 1910; and the funeral expenses.

Shortly after the death of the father in February, 1910, Jonathan G. Ade, the complainant herein, demanded payment from the mother, but never in fact presented the note to her. He also claimed to have talked with the defendant, Wm. H. Ade, about it.

On March 26, 1910, the mother, Bertha Ade, deeded the property to Wm. H. and Theodore J. Ade. Afterwards Wm. H. transferred his interest in the property to Theodore J. Ade. Prior to this, the mother, who was the beneficiary in the life insurance policies, assigned her interest to her son, Wm. H. Ade. The money on these policies after the death of the father, was collected by Wm. H. Ade, who in turn gave Theodore J. Ade his pro rata share.



The complainant contends that the transfer of the property and the assignment of the life insurance policies by Bertha Ade to Wm. H. and Theodore J. were without good and legal consideration, and were therefore void as to creditors: and furthermore, made for the purpose of defeating the complainant Jonathan G. Ade in the recovery of the claim in controversy.

On the hearing before the master, the complainant called the mother, Bertha, the two other defendants, William H. and Theodore J. Ade, and also testified personally. After the complainant rested, these same witnesses, also a George C. Beck who had roomed at the home on Diversay street in 1901, were called to testify for the defendants.

William H. Ade, in his testimony as a witness for the complainant and on behalf of the defendants, stated positively that an agreement had been entered into between John G. and Bertha Ade on the one side, and himself and his brother Theodore J., on the other, the terms of which have already been set forth; that in pursuance of said agreement he and his brother had paid the premiums on the life insurance policies, taxes of all kinds on the property, fire insurance to protect the house, money due on the mortgages that had been placed on the homestead, attorney's fees, and moneys necessary for the personal comfort of the mother and father, namely, for clothes, drugs, doctor bills, etc., and spending money; and in addition, the weekly expenses to maintain the household; that from 1901 to 1909 these expenses were paid by him personally, and the brother Theodore J. paid him his share; that after 1909, when he married, his brother Theodore J. Ade paid all the expenses and he paid his share of same; and that the mother, Bertha Ade, is now living with him at his home; that there was advanced by him and his brother in these payments a sum equal to more than twice the value of the homestead and the amount of the life insurance policies.



He was corroborated in his testimony by his brother, Theodore J. Ade. The mother who was called by the complainant, was examined through an interpreter, and while she did not testify in so many words that an agreement had been made, still we regard the import of her testimony to be that the property and the insurance money was to have been turned over to the defendants, William H. and Theodore J. Ade, in consideration of the moneys expended by them since 1901. There were offered as exhibits, receipts for many payments made by the two sons of the principal defendant. The witness Beck testified that he lived at the home until December, 1901; that during the time he lived there he paid \$1.50 per week board.

The only other evidence was that of the complainant Jonathan S. Ade. He testified that while he knew his brother Samuel had been in trouble and that it was of a serious character and might involve criminal prosecution, yet he did not know of any meeting had for the purpose of raising money to help Samuel out of the difficulty and in consequence of which a mortgage for \$500 was placed on the home; nor did he know of any subsequent agreement in which a mortgage for \$350 was placed on the home in the year 1900. He further testified that he did not know of the agreement which resulted in the transfer of the store from John S. to Steven H. Ade, nor of an agreement by virtue of which the defendants claimed the homestead was transferred and the life insurance policies assigned. He further testified that he lived at home until he was married, which was in the year 1901; and that during the time he was there he paid board at the rate of \$5 per week; that after he left home, he contributed nothing to the maintenance of the household of his father; that he did, however, make certain repairs such as building a fence, building a porch and also painting several rooms. The total amount of such service for both the material and the labor was comparatively small. He further testified that the father and



mother had trouble in having the defendants William H. and Theodore J. pay board at home, and that frequently the mother and father would come to him to enlist his aid in getting the boys to pay their board; and he testified that frequently the defendants quarreled with the mother and father about maintaining the household.

Complainant maintains that, whatever moneys were advanced by defendants were in the form of a gratuity and in the performance of a natural duty owing from the children to the parents.

The defendants contend that these payments were made by them in pursuance of an express agreement entered into by John A. and Bertha Ade, that if they would do so they should receive the property in question and the life insurance policies, either at the death of the mother and father, or at such time as the moneys advanced for the purposes hereinabove set forth should equal the value of the homestead and the amount of the life insurance policies.

The master, however, found that there was no enforceable contract entered into between John A. Ade and his wife on the one side, and the two defendants, William H. and Theodore J., on the other; that the payment for expenditures in this case testified to by the defendants were in the nature of a gratuity; and that the transfer of the property and assignment of the life insurance policies were without good legal consideration and for the purpose of defeating the payment to the complainant of the claim on this judgment.

We have carefully reviewed the entire testimony in this case, and find ourselves unable to concur in the findings and conclusions of the master. The evidence as to the contract, given by William H. Ade is not contradicted in any way, either by testimony or by any facts or circumstances appearing in the case. He is corroborated by the mother and the brother.





In their testimony William W. and Theodore J. Ade stated that they had paid between \$9,000 and \$9,000 since the year 1901, and up to the beginning of this action; that the payment of that sum was more than twice the value of the homestead and the amount of the life insurance policies. In this amount there was included a considerable sum for what are known as ordinary household expenses such as the actual living expenses, and for which no receipts were offered in evidence; but the testimony shows that they were paid by the boys William W. and Theodore J. Ade.

There were receipts introduced in evidence for a sum exceeding \$7,000. An inspection of these receipts clearly shows that they were not for ordinary household expenses, <sup>but</sup> for life insurance premiums, taxes upon the realty, special assessments and the release of mortgages upon the homestead. In addition, there were personal expenses for the mother and father, such as doctor bills, clothing, etc. These are all items which cannot be considered as living expenses, which the boys contributed, because of having a home with the mother and father.

The mere fact that many of these receipts are in the name of John G. Ade, the father, is not <sup>necessarily</sup> contradictory of the fact that an agreement had been made as contended for by defendants. It was but natural that, the home being in the mother's name and the house being run by the mother and father, that all bills and receipts should be made out in either of their names.

Nor can any inference be drawn from the fact that no books of account or written memoranda were kept from which an account could easily have been drawn, evidencing payments made by the sons. Importance may be attached to that fact if total strangers had been parties to the agreement; but in a small family as this was, it would not be unusual for the boys simply to make payments with-



out keeping memoranda. However, a great number of receipts were kept, and they were introduced in evidence. Nor is it significant that there were receipts for only certain expenditures, because those expenditures were of a character for which receipts usually are given and preserved.

The fact that the assignment of the life insurance policies came after the father's death and the property was transferred after demand had been made by the complainant, is not of any unusual significance: at least, we do not believe that an inference can be drawn from those facts that would warrant a finding that the preponderance of the evidence lay with the complainant.

The father was sick for two years before his death. The defendants, William H. and Theodore J. Ade, secure in the knowledge that they were complying with the agreement entered into with their parents, might naturally hesitate to ask for the actual transfer until it became necessary. The evidence clearly shows that these two sons were industrious and frugal; that they were constantly employed and in receipt of good incomes. We find nothing in the evidence which subjects their testimony to suspicion; in fact, to our minds, the circumstances in the case import verity to it.

The circumstances given in evidence with reference to the manner in which this note was given, namely, for money realized from the estate of Emanuel Ade; the starting of the drug store; the embarrassing financial<sup>diff-</sup> difficulties of Samuel Ade; the turning over of the drug store thereafter to Steven H Ade in consideration of his making certain payments, such as life insurance premiums and contributing to the support of the mother and father: the failure on the part of Steven to carry out that agreement; and the fact that no one contributed to the support and maintenance of the household save for the few months that complainant paid \$5 per week, except the two defendants, William H. and Theodore J. Ade, - are



strongly corroborative of the testimony of William F. Ade when he stated that at the time the agreement was entered into with his father and mother, his father said: "The store was to be taken away from him, there wasn't very much remaining, and that he would have no support and we would have to take care of his support as long as the older ones were slipping away. We were not sharing in anything, and it was only right and fair that we get all the moneys we advanced and be paid back to us."

There is a finding by the master that Jonathan F. Ade, the complainant, and Beck the boarder, contributed to the household expenses, but the finding does not state for what period of time they contributed to the household expenses. As we read the evidence in this case, after 1901 Jonathan F. Ade, the complainant, was there but a few months, and Beck also left some time in 1901, and that thereafter the two defendants, William F. and Theodore F. Ade alone maintained the household until the death of the father in 1901, and since that time have provided for the mother, Bertha Ade, who at the time of the trial was 85 years of age. In this same finding the master found that the father and mother were apparently without other means of support.

In support of his contention that the payments which the young men made were in the nature of a gratuity, complainant cites the case of Marshall v. Coleman, 187 Ill. 575. In that case a claim was made for the care and maintenance of a grandson. On page 575 the court stated:

"During the years in question Edward F. Bodner was a member of the family of his grandfather, and the care and maintenance, which were extended to him by his grandfather, are presumed to have been so extended gratuitously in the absence of evidence as to any arrangement they were to be paid for. (*Italics ours.*)"

"No evidence appears in this record to rebut the presumption, that the care and maintenance referred to in this bill were furnished to the deceased, Edward F. Bodner, by his grandfather gratuitously."

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The language employed by the court in that case would not apply to the case at bar. There is evidence in the case at bar that an arrangement was made to repay the defendants for the maintenance and care of the home and household; moreover, the evidence in the record affirmatively rebuts the presumption that the payments for the maintenance of the home and household were gratuitous.

Neither is the case of Lange v. Dietz, 161 Ill. 161 cited by complainant, applicable to the case at bar, because in that case the court held that there was no express or implied contract covering the payments, and that in the absence thereof they might be considered gratuitous. In the case at bar, the evidence shows that there was a contract.

We have carefully reviewed the facts set forth in the entire testimony, and are firmly of the opinion from these facts and the inferences that reasonably flow therefrom, that a valid agreement was entered into between John A. Ade and Bertha Ade, the mother and father, on the one hand, and their sons William H. and Theodore J. Ade, on the other: that in pursuance to the said agreement the payments testified to by these defendants, were made, and that the payments furnished a valid and good legal consideration for the transfer of the property and the assignment of the life insurance policies; that the master's findings, conclusions and recommendations are manifestly contrary to the weight of the evidence; that the decree based as it was on the master's findings, conclusions and recommendations, is therefore erroneous and must be set aside; that the creditor's bill is without equity and should be dismissed.

For the reasons hereinabove assigned, the decree will be reversed and the cause remanded to the Superior Court of Cook County, with directions with ~~xxxxxxx~~ to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

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JOHN F. DEVINE, Administrator of  
the Estate of GEORGE W. MOORE,  
Deceased.

Appellée.

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SHERMAN HOTEL COMPANY.

Appellant.

## APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

109 L.A. - 02

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

This is a suit brought by John F. Devins, administrator of the estate of George W. Moore, deceased, against the Sherman Hotel Company, a corporation, to recover damages caused by the negligence of the appellant.

Deceased, at the time he met the injuries from which he died, was employed as a watchman or detective for the appellant. He worked at night, patrolling the hotel from the eighth to the thirteenth floor; in doing which he would start from the thirteenth floor and walk over each floor of the hotel, down to the eighth floor, where he would signal the employees' elevator to take him back up to the thirteenth floor. In addition to these duties, he also relieved a watchman or detective named Smith A. Sylvester on the first floor while the latter went to lunch after midnight. During that hour deceased would be in a sort of a lobby in the hotel in front of the freight elevators, of which there were two in number. It was decedent's duty to see that no strangers used these freight elevators, although employees were permitted to ride thereon; and decedent also had to take charge of any baggage coming in or going out from the baggage room, which was situated one-half floor above the first floor.

At one end of this short lobby where deceased was substituting for the night watchman, there<sup>were</sup> also freight elevators side by side. The opening of these elevators was to the east.

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During the night but one of these elevators was operated, and on the night in question, - or rather, the early morning hour of the day in question - the south elevator was being used and was in charge of one Jacob S. Gabriel.

Some time after one o'clock Gabriel reported the electric signal system of the car out of order. Ralph Ottrey, employed by appellant as an electrician, was called to remedy the defect. The car was brought down to the level of the first floor. He found there was a wire broken and began work to repair the defect.

The elevator was all enclosed with sheet iron, save at the door. This door opened to the south. The lever of the controller of the elevator was about nine inches from the south end of the door. The doors of the elevator were of regulation width. The indicator by which the operator could tell when the electric signals were given on any floor, was to the extreme south of the car, and above the head of the elevator operator. The signal button is located in a box on the outside of the shaft, just between the two elevators; the other elevator being to the north.

When Ottrey, the electrician, was working upon the signal system, the door of the elevator was open, and the dome light of the elevator was on. When in working order, the electric signal should register the call, and as the car ascends or descends from the floor where the signal was given, the light flashing the signal should be extinguished.

While the car was on the first floor, Ottrey would stand in the elevator door with his hand on the signal box, and look into the car to see whether or not the signal registered while the car was standing still; then, to see whether it was working properly and extinguished when the car was raised, he would ask the elevator man to raise the elevator ten or twelve feet. While this work was going on, the deceased was in the lobby, either sitting in a chair back of where Ottrey was working, or standing back of him.

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There was but one count in the declaration, and the gravamen of the charge was, that deceased, an employee of the appellant, was about to enter said elevator which was in charge of and operated by another servant of the appellant, and who was not a fellow servant; and which said elevator was then and there standing at the first floor landing of said building; and while elevator door was open and the dome light on, the deceased, while in the exercise of due care for his own safety was in the act of stepping into said elevator, or about to place his right foot on the platform, appellant, by its servant operating the elevator, negligently caused the same to start suddenly upward without warning to the deceased, before he had time to place his other foot within the elevator, by means whereof the deceased was caused to stumble, fall and be thrown down violently, and that his left leg was lacerated between the floor of the elevator and the framework above; that he sustained internal injuries, as a result of which he died a short time afterward. To this count the appellant filed a plea of not guilty.

At the trial of this case there were but two witnesses called, namely, the electrician on behalf of the plaintiff; and Gabriel, the elevator operator, on behalf of the defendant.

Ottrey, the electrician, related the circumstances leading to his presence at the elevator as above outlined. He testified that he had asked the operator to raise the elevator and come down about four times; that during this time the elevator door was open and the dome light in the elevator was on; that the last time Gabriel, the elevator conductor, came down before the accident happened, he said: "It's all right now;" that he (Ottrey) then started to put on the cover on the <sup>signal</sup> box on the outside: during that time the car was standing for a period of two or three minutes; that he wished to make a final test, and told the elevator man to raise her up again; that when he looked towards the elevator again

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he saw the deceased stumble or fall into the car; at that time the car was twelve or eighteen inches above the floor; that the deceased then hollered, and the elevator was brought to a stop about eight inches from the floor above; that this accident happened when he asked the conductor to make a last test so he might be certain the signal was again operating properly; that during the previous times he had sent the car up to test the signal, deceased was near or behind him, and that he was either sitting or standing; that the time consumed in fixing the signal was about twenty minutes; that about ten minutes before the accident, deceased went into the elevator to the north and called attention to the fact that the signal was working all right in that elevator.

The elevator operator who was called on behalf of the defendant, stated the facts just as given by Ottrey, the electrician. He said he did not know deceased was in the car until he heard him cry out; and at that time the elevator was a considerable distance above the first floor landing.

A circumstance which must be considered, and which was testified to by both the witnesses is this: that in order to give the proper information to Ottrey as to whether or not the signal worked properly, the elevator man, after starting the car, would have to keep his eyes on the indicator which was at the extreme right above him, and therefore necessarily away from the door. Neither one of the witnesses actually saw the deceased as he started to enter the car. The electrician was at the signal box giving the signal and facing west; the elevator operator was in a position watching the indicator inside the car. Moreover, during the entire time the repairs were being made, deceased was present; he participated in their conversation.

While it is true that Sylvester, the man whom he relieved, had returned from luncheon, and Moore was in a position to go back

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to work to the upper floors, yet there is no evidence in this case which in any way can be taken as proof that he had manifested an intention to become a passenger of the elevator for the purpose of going back to his work. At the time deceased met the injuries which caused his death, the car was completing the final test; neither the electrician nor the operator had any reason to believe he would attempt to go on the car. Both knew he had been watching them. While the record is silent as to the fact whether or not deceased ever rode on this elevator from the first to the eighth floor while working there, yet it might be presumed he did have the right, and did so because he had the right to use the elevator from the eighth to the thirteenth floor. However, his use of the elevator at the first floor was not so frequent as to lead the elevator operator to expect him to enter the elevator at any time. On the contrary, we think the facts and circumstances in evidence clearly indicate that deceased got on the elevator at a time not expected, and in a manner unexpected. This is evidenced in the testimony of the plaintiff's only witness, Ottrey, when in answer to a question he said:

"Well, I says, all right, raise her up, and just dropped under like that, and he went by me, and I didn't look right at the floor, but when I looked he stumbled, the car was about 12 or 18 inches above the floor right then, that is when he fell you know. \* \* \* I saw him as he stumbled, it was instantaneous, the whole thing."

The declaration, which consisted of but one count, charged that the deceased, while in the exercise of due care, was in the act of stepping into said elevator, and while placing his right foot on the platform, the operator negligently caused the car to start suddenly upward without warning to the deceased, which caused him to stumble and fall, whereby he was thrown down and his leg crushed between the floor of the elevator and the framework above.

Under this declaration, it was necessary for the plaintiff to prove this allegation by a preponderance of the evidence.

1. The first step is to identify the problem or question that needs to be addressed. This involves understanding the context and the specific requirements of the task.

Defendant contends that not only has the plaintiff failed to prove this allegation by a preponderance of the evidence, but that the evidence was of such a character that the court should have instructed the jury to find for the defendant.

Plaintiff devotes but few pages of his brief to the merits of his contention, but the main argument is with reference to exceptions preserved. He contends in the first place, that the bill of exceptions does not recite that the evidence contained therein constituted all the evidence taken.

In the bill of exceptions, just prior to the instructions of the court, and after the statement that both the plaintiff and defendant have rested there is this recital: "The foregoing is all the evidence received in the above entitled cause," which is conclusive of the point made.

Appellant urged that the court erred in overruling its motion for a new trial. Plaintiff contends that the bill of exceptions does not show that a motion for new trial was made and overruled, and an exception taken thereto.

After the first briefs were filed and this point was raised by the appellee, appellant suggested a diminution of the record, and was given leave to file an additional record, as an amendment to the bill of exceptions then on file. What purports to be a certification of certain amendments to the bill of exceptions was filed in this court, but an examination shows that it is merely a record of the clerk. While it contains an order purporting to have been entered by a judge, which states that from an examination of the record and files, a motion for a new trial was made and overruled and exception taken thereto, and permitting said facts to be set forth in his amended bill of exceptions, and provides for said order being filed nunc pro tunc as of the day when the original bill of exceptions was signed, yet there is no certification by the court to the said order; in fact, the additional

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record does not contain this certificate of the judge which is necessary to make it properly an additional bill of exceptions, or that it might properly be considered an amendment to the bill of exceptions.

In that state of the record we cannot consider the court's ruling on the motion for a new trial, and therefore cannot pass upon the question of the weight of the evidence.

Defendant, however, has properly preserved for review the question of law raised by the instruction offered both at the close of the plaintiff's and at the close of all the evidence, to instruct the jury to find the defendant not guilty.

Upon a motion of this kind, the rule of law is, that if the court is of the opinion that there is no evidence in the record to sustain a verdict for the plaintiff, it is the duty of the court to direct a verdict.

A careful review of the testimony in this case leads to the irresistible conclusion that as a matter of law there was no evidence of negligence as charged in the declaration. Therefore the court should have directed a verdict for the defendant.

As it appears, the only persons who actually were present and saw the accident were called as witnesses and examined fully as to the occurrence in question, it is fair to presume, therefore, that the plaintiff presented the strongest case possible under the circumstances; hence, it will serve no useful purpose to remand the case for another trial. We therefore feel constrained to reverse with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Finding of facts: The court finds, as an ultimate fact, that the defendant was not guilty of the negligence charged in the declaration.



FRANK STOECKER,  
Appellant,  
  
vs.  
  
J. E. THOREN,  
Appellee.

}  
} APPEAL FROM  
}  
} MUNICIPAL COURT  
}  
} OF CHICAGO.

109 I.A. 504

STATEMENT OF THE CASE. This proceeding grew out of an action brought by one Ludwik Kowalski against Frank Stoecker, J. E. Thoren, and several others, for damages because of injuries sustained by him as a result of falling into an unguarded excavation located at 111th street and Vincennes avenue, Chicago. In the suit brought by Kowalski, all the defendants were dismissed save Frank Stoecker and J. E. Thoren, who will hereafter be referred to as the appellant and appellee respectively; and a judgment was recovered by said Kowalski in the Circuit Court of Cook County against appellant and appellee for \$2200 and costs. The said judgment was satisfied in full; appellant and appellee <sup>each</sup> paying one-half thereof, and Kowalski executed a release running to both.

Subsequently appellant instituted suit against appellee in the Municipal Court of Chicago to recover the amount disbursed by him personally in satisfying the aforementioned judgment and the amount paid out by the Aetna Life Insurance Company in appellant's behalf, under an insurance contract existing between them. This case was tried without a jury, and the court found the issues against the appellant for costs, from which judgment appellant has prosecuted this appeal.

The judgment in the case of Kowalski, supra, was offered in evidence in the case at bar by the appellant, and was admitted without objection on the part of the appellee, both sides claiming that it was to a certain extent controlling of the issues in the case at bar: plaintiff insisting that it was the basis of his cause





of action inasmuch as he paid one-half of the judgment, and defendant contending that with reference to appellant's claim that appellee was an independent contractor and therefore appellant should be entitled to recover against him, the judgment in the suit brought by Kowalski was res judicata on that point.

The accident out of which both these cases arose occurred on the premises of one John Goetz, located at 111th street and Vincennes avenue in Chicago, on Sunday, March 19, 1911.

In February of that year, John Goetz, the owner of the premises in question, entered into a verbal contract with appellant for the erection of a building on the said premises, appellant becoming the general contractor by virtue of the said contract. On February 27, 1911, at the request of appellant, appellee accompanied him to the premises for the purpose of examining the ground, presumably with the idea of having appellee do some work in connection with the building contract. Appellee was a mason contractor and had previously been employed by appellant.

On this occasion, while examining the ground, appellant asked appellee to secure someone to do the excavating. Appellee thereupon saw several people with reference to doing this work and submitted to appellant several bids. Appellant then told appellee to go ahead and give the work to the lowest bidder; pursuant to which instruction appellee, in his own name, entered into a contract with one Landon to do the excavating work for \$725. Landon commenced work on March 5th, and completed the work on March 18th.

During the interim, appellant visited the premises where the excavating had been done, and on one of these occasions, namely, March 13th, met appellee. Up to this time no contract had been entered into between appellant and appellee; ~~xxxxxxx~~  
~~xxxxxxx~~ although the two had been dis-

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cussing a contract for the concrete, cut stone, and brick work for this particular building. Appellee seemed anxious to get this contract and had submitted an estimate to appellant. Appellant then informed appellee that before awarding the contract he would get other bids on this work, and that if appellee met the lowest bid he would be awarded the work. In the meantime, the excavating was nearing completion.

On March 17th Landon, the excavating contractor, called up appellee on the telephone and said he would be through with his work the following day; and on Saturday, the 18th, again called up appellee, informing him that he had completed his contract and that he would see to the lights that night, but that his responsibility was not to extend beyond that Saturday night, in connection with these premises.

On this same day, namely, March 18th, appellee telephoned appellant that he had word from Landon that the excavating work had been completed. Appellant then asked if appellee could start the other work immediately, and appellee replied that he could not very well start on Saturday afternoon, but would on the following Monday. Appellant then told appellee to order the material for Monday so he could have the stuff to start then, which appellee agreed to do.

Appellant next saw appellee on Sunday morning, March 19th, when appellee had with him the building plans and his estimate for the work, which was \$2550. Appellant then told appellee that he had a competitive bid of \$2250, to which appellee replied that he could not meet that figure; and then appellant said that if appellee would do the work for \$3350 he would let him have the contract; and appellant further told appellee to bring a load of scaffolding Monday morning.

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However, on the same day appellant told appellee that he had received a message from the owner, John Loetz, and that perhaps there would be a change in the plans; but he expressly told appellee to load the scaffolding, and if necessary, he would pay appellee for his trouble in the event he did not receive the contract; and furthermore, that if appellee did not receive a telephone message from appellant by three o'clock that afternoon, everything would be all right. Appellee received no message from appellant that afternoon.

As to the aforesaid facts and circumstances there was no contradiction at the time of the trial. From this point on, however, there was a <sup>contradiction</sup> ~~xxxxxxx~~ in the testimony offered on behalf of the appellant and appellee respectively.

Appellant testified that the next time he saw appellee was on Tuesday, March 21st, when at the premises in question. Appellee testified that appellant came to his yard on Monday, March 20th, where the material was being loaded on the wagon, for use at the premises, and stated he had seen the owner the night before, and that there was to be a change in the plans whereby the building would be made ten feet longer; that appellant further said it was not certain that he (appellee) would be awarded the contract, but nevertheless for him to let the scaffolding remain on the wagon; that he there told appellant the cost of loading and hauling the scaffolding was \$20, and that thereupon appellant told him to haul it over, and if he didn't get the job he would pay the cost of the hauling. Appellant, however, denied having had this conversation or even having seen appellee on this day.

Landon, the excavating contractor, who was called as a witness by appellant, testified as to the circumstances under which he took the contract for excavating. He stated further, that he

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telephoned appellee on Saturday that the contract had been completed, and that he would take care of the lights that evening, but wished appellee to look out for them thereafter; that he talked with appellee Sunday evening and told him he would depend upon him to look after the lights, and that appellee replied he would do so.

Appellee, in his testimony, while admitting that Landon had told him that the excavating work had been completed and that he looked to the appellee to attend to the lights on Sunday evening, stated that he did not promise Landon that he would take care of the lights, but told Landon he could not do anything because he didn't have the job.

Frank Harpa, a witness called by appellee, was the teamster who hauled the scaffolding from appellee's yard to the premises where the building was being erected. He testified that while loading the scaffolding on Monday morning in March he saw appellant in appellee's yard about seven o'clock in the morning; that appellant and appellee were talking together, but that he did not hear what was said, as he was inside of the yard and they were outside on the sidewalk.

Appellant endeavored to impeach Harpa's testimony by showing that at the trial of the original damage suit he testified contrary to what he said in the case at bar. There was offered and received in evidence on behalf of the appellant a written contract between the appellant and the appellee, wherein the appellee, in consideration of \$2350, agreed to do the concreting, cut stone and brick work on the foundation, basement and building at the premises in question; the said contract concluding as follows:

"It is further agreed the second party shall not in any manner be answerable or accountable for any loss or damage arising from negligence or carelessness of the first party to any person or persons and their property (loss or damage by fire excepted)."

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This contract bore the date of March 18, 1911; appellant, however, admitted that it was not actually signed until March 23th or 27th, 1911. The evidence shows that it was signed while appellant and appellee were riding home in a street car; that this contract was written on Sunday, March 19th, about five o'clock, by Rudolph Hollner in his real estate office, and that it was drawn up at the request of appellant; that it first bore date ~~xx~~ the 23th, and afterwards changed to the 18th.

Upon this evidence appellant maintains: (1) That appellee, at the time of the accident to Kowalski, was in control of the premises and occupied the position of an independent contractor, and was alone responsible for any act of negligence by reason of which Kowalski was injured, and that if appellee was not an independent contractor, he was the agent of the appellant at the time in question and liable for any negligence while acting in that capacity which caused loss or damage to his principal, and thereby bound to make full indemnity to the principal; and (2) that the evidence shows there was either an implied or express contract of indemnity with regard to the accident in question. He contends that the finding and judgment of the court upon these issues was clearly and manifestly against the weight of the evidence.

Appellee contends that inasmuch as in the original damage suit, namely, that of Kowalski v. City of Chicago, et al., supra, the jury found both appellant and appellee guilty, the ~~xxxxixix~~ ~~xxxxixix~~ judgment upon the verdict, determined in the case at bar, the issue on the question of independent contractor, and that the judgment on said verdict was therefore res judicata on that issue; furthermore, that the appellee was not liable as agent of the appellant, either by reason of the fact that he hired Landon to do the excavating work or by any written contract entered into on March 26th; and moreover, that the evidence shows that at the time the accident occurred, appellant was in control of the premises and not appellee.

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MR. JUSTICE PAX DELIVERED THE OPINION OF THE COURT.

On the question of the right of appellant to recover from appellee on the theory that the evidence shows that appellee was an independent contractor having exclusive charge of the premises during the time of excavation, we are of the opinion that the judgment in the case of Kowalski, supra, was determinative of that issue. The original and amended declarations in that case were offered in evidence. The acts of negligence charged therein were averred against both appellant and appellee, and contained the allegations that they were in joint possession of the premises at the time of the accident to Kowalski. On the trial of the case under this declaration, they were both found guilty.

Appellant alleged in his statement of claim in the case at bar, that appellee had sole possession of the premises at the time the accident occurred. Appellee in his affidavit of merits, denied this. This was one of the issues in the original case. The judgment in that case, entered upon a verdict of guilty against both appellant and appellee, was res judicata of that issue, and concluded the appellant in his present claim that the appellee was an independent contractor.

Appellant further contends that the conversations during the latter part of February, 1911, with appellee, as a result of which Landon began excavation work on March 5th; and their conversation on March 13th with reference to the mason and brick work, and what was done pursuant to those conversations, were in the nature of contracts containing an implied agreement of indemnity from appellee to appellant.

On the question of implied indemnity, we are of the opinion that appellee, in securing Landon to do the work of excavating, acted only as the agent of appellant. Appellant asked appellee

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to secure bids for excavating; appellee did so and reported the bids to appellant, who told him to accept the lowest. The evidence shows that the agency extended only to giving the contract for the excavating. The evidence further shows that there was no arrangement for any work, either before Landon began work or up to the time that he had finished.

With reference to Landon's doing the excavating, that work was done independently of any other work.

During the interim that Landon was doing the work, appellee discussed with appellant on March 18th the question of securing the contract for the mason and brick work, and appellant then told appellee that if he could meet competitive bids still to be received, he could have the contract.

There was nothing binding in this conversation, in the nature of a contract; in fact, we cannot see any reciprocal relations established between the parties by reason of the conversations or acts of the parties at either of these periods, and can find no testimony which would have warranted the trial court in entering a finding that there was an implied contract of indemnity.

This leaves but the question of whether or not there existed an express contract of indemnity between the parties. There is no conflict in the evidence of either appellant or appellee, as to the conversations or what occurred up to and including March 18th, when Landon reported to appellee over the telephone that the work of excavation had been completed, which fact appellee in turn communicated to appellant. At this time no contract existed for masonry, brick, or foundation work; in fact, on Sunday morning, March 19th, the day of the accident to Kowalski, the other bids were first made known by appellant to appellee; and while a definite figure was arrived at as to the contract price, which included the excavating done by Landon, this reservation was

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made by appellant; that the owner was considering a change in the plans, and he (appellant) was to have an interview with the owner on that day, but that if nothing further was heard from appellant by three o'clock that afternoon (March 19) he might start work on Monday.

At this point appellant claims he told appellee that if the scaffolding was brought over Monday and there was any change in the contract, he would pay the expense thereof. This the appellee denied, claiming that on Monday, the day after the accident to Kowalski, appellant came to him and stated that there was to be a change in the plans whereby the house was to be made longer, and that it was not certain whether he could give the contract to appellee; but that if he would bring over his scaffolding, he would pay him the expense connected therewith, in the event that the contract was awarded to someone else. The teamster who did the hauling of the scaffolding, corroborates appellee, in his testimony that he saw appellant in appellee's yard that morning.

Outside of the excavating done by Landon, the evidence is clear that no work had been done by anybody on these premises until the scaffolding was brought over on March 20th, the day after the accident, by appellee. The contract offered in evidence by appellant, which he claims contains an express contract of indemnity, was prepared at appellant's request in the office of a real estate man, who testified on behalf of appellant. It is admitted that this contract was not signed until the 26th of March - a number of days after the accident occurred. Appellant, in the course of his argument, says appellee in signing that contract had in mind the accident that happened to Kowalski, and therefore fully intended to indemnify appellant as to that occurrence.

The contract makes no mention of any accident that had occurred. From the terms of the contract itself one could have in

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mind only what might occur after it had been signed. Dating it back to March 18th in itself did not create a liability for this accident on the part of the appellee: nor is the evidence as to what happened on March 18th conclusive that they had even arrived at the terms of the contract. Even as late as Sunday, March 18th, until three o'clock, according to appellant's testimony, the giving of the contract was in the alternative, depending upon the change of plans on the part of the owner, Mr. Doetz: and according to appellee's testimony, there was still that uncertainty on Monday, the day after the accident.

The trial court, in finding the issues for appellee, was evidently of the opinion that there was neither an implied nor an express contract of indemnity by reason of the conversations and acts of the parties from February up to and including the signing of the contract in evidence. We cannot say that such finding is clearly and manifestly against the weight of the evidence. On the contrary, we are of the opinion that the trial court was fully warranted in arriving at that conclusion.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.



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|--------------------------------|---|---------------|
| CARRIE M. HERR,                | ) |               |
| Appellee,                      | ) | APPEAL FROM   |
|                                | ) |               |
| vs.                            | ) | CIRCUIT COURT |
|                                | ) |               |
| CHICAGO, ROCK ISLAND & PACIFIC | ) | COOK COUNTY.  |
| RAILWAY COMPANY,               | ) |               |
| Appellant.                     | ) |               |

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MR. JUSTICE PAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case brought by the appellee, Carrie M. Herr, who will hereafter be referred to as the plaintiff, against the appellant, the Chicago, Rock Island & Pacific Railway Company, a corporation, and hereafter referred to as the defendant, for damages alleged to have been sustained by her while getting off one of said company's suburban trains.

The declaration, which consisted of but one count, charged that the defendant permitted the platform of one of its cars to remain in an icy, slippery, negligent and dangerous condition, and that while plaintiff was a passenger on said coach or car, and while the said car and train were stopped to give the passengers an opportunity to alight therefrom, and while plaintiff was preparing to leave said coach and as she stepped on platform thereof, and while at all times being in the exercise of due care and caution for her own safety, she by reason of said icy, slippery, negligent and dangerous condition of said platform, was thrown with great force and violence from said platform upon the ground, by reason of which she sustained the injuries complained of.

On the trial of the case the jury found the defendant guilty and assessed the damages at \$2000, upon which verdict of the jury the court entered judgment, from which judgment this appeal has been prosecuted.

Defendant contends that the verdict of the jury is clearly and manifestly against the weight of the evidence; furthermore,

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that the court erred in the giving and refusing of certain instructions; and that the damages are excessive.

There is a conflict in the evidence as to the manner in which the accident occurred, at least the defendant so contends. Plaintiff, in her own testimony, stated positively that she boarded the said train at 23rd street; that she entered by the front door of the car in question and took a seat at the rear; that after the train reached its destination she went to the rear platform to get off the car; that there was a strip of ice six inches long and five inches wide frozen to the wood, located about a foot from the edge of the step; and that just as she turned to go down from the platform, she stepped on it and slipped; that she had not seen it prior to that time; that when thrown to the station platform her feet went out first; that just after she fell, she was assisted by a man who came along; that a wheel chair was procured wherein she was conveyed to the waiting room, whence she was taken to St. Luke's hospital, and from there to her home in an ambulance, and later to the Washington Park hospital, at which place she received medical attention.

Another witness for the plaintiff, W. H. Butenschoen, who was a passenger on the same train, testified that he had just gotten off the train and had reached the cement walk between the two coaches, when he heard a cry; that he saw a young lady (the plaintiff) falling, and caught her; that he asked some gentlemen to assist him in taking her to the ladies' waiting room. This was all the evidence offered by plaintiff as to how the accident occurred.

On behalf of the defendant there was only one witness who testified that he saw the plaintiff prior to the happening of the accident; that witness was the conductor of the train, H. I. Bitzer. He testified that he noticed plaintiff in the car, and remembered her because she was the only one who paid a cash fare:

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that after the train reached its destination in Chicago, he stood between this coach and the one immediately to the rear, helping the passengers alight, and that he remembered the plaintiff's alighting from the car; that he later heard someone say a lady had fallen; and that he then noticed plaintiff being supported on the station platform by a gentleman, about ten or twelve feet away towards the middle of the car in which plaintiff had been riding; that he went to where she was, and sent an usher for a wheel chair; that after she had been placed therein, he asked plaintiff for her name and address, and that she said "it was not necessary, that she did not wish to have any commotion about it, and that it was nobody's fault but her own."

The collector (McKean) who took up tickets in the first four cars of the train, and the flagman (Williams) testified that they saw the plaintiff in the wheel chair, and also heard her make the aforesaid statement to the conductor.

Defendant further offered testimony that plaintiff was taken to the waiting room, and while there, it was discovered that she wore a sort of slipper with a high French heel. This was testified to by the conductor and the matron in the waiting room, Mrs. Edna Wolf, and a stenographer of the defendant, a Miss Lora M. Barber. Mrs. Wolf further testified that when she asked plaintiff how the accident occurred, whether she slipped on anything in the train, or in the train shed, or on the waiting room floor, ~~xxx~~ that plaintiff answered "No," that her foot had turned; and that she, the matron, then said, "It is no wonder, wearing such a high heel shoe." Miss Barber claims that in going to the washroom, which was off the rest room, she noticed plaintiff, and heard her say to Mrs. Wolf, "Yes, I think it was my high heels."

Defendant also offered testimony of there being no snow or ice on the ground that morning and the previous day. The

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testimony further shows that the temperature on the day of the accident was between 17 and 23 degrees; that there was no snow or rainfall that day; that on January 28th, Sunday, there had been a light rain or mist about eight o'clock in the morning for about one hour.

Defendant, in its brief, lays great stress upon the evidence of Sitzer and McKean, the conductor and collector of the train in question; that they made an examination of the station platform and the platform and steps of car 43, which was the car upon which plaintiff was a passenger. Both these witnesses testified that they made this examination because it was customary to do so after the happening of an accident.

There is nothing in the testimony of the defendant to show what directed their attention to this particular car and the rear platform of the said car; nor does any witness for the defendant state that plaintiff claimed to have slipped on the platform of that car and fallen to the station platform. Furthermore, the evidence shows that this was the only car whose platform and steps were examined. The jury, in weighing the evidence, might well have drawn an inference therefrom, that either by what the plaintiff said at the time the accident occurred, or what the conductor saw at that time, standing as he was between the two cars, that the plaintiff had fallen from the platform of the car to the station platform.

Moreover, the plaintiff was corroborated by the testimony of the witness, Putenschoen, that he saw her fall as he was between the ends of the two cars. To offset this positive testimony of the plaintiff and the witness Putenschoen, defendant offered the testimony as to <sup>alleged</sup> statements made by the plaintiff to the various employees of the defendant. The weight of such testimony as against the positive testimony of the plaintiff was properly a question for the jury.

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The court who saw these witnesses and heard them testify, overruled defendant's motion for a new trial, and entered judgment on the verdict. We are of the opinion not only that the verdict is not clearly and manifestly against the weight of the evidence, but, moreover, that the jury were warranted in arriving at their conclusion.

Defendant complains of the second instruction offered on behalf of the plaintiff. We have carefully read this instruction, and believe the facts in evidence warranted the court in giving this instruction; in fact, from a reading of all the instructions offered in the case, we find that the jury were properly and fully instructed as to the law applicable to the facts proven.

With reference to the claim of defendant that the damages awarded are excessive: the evidence showed that plaintiff sustained a fracture of the ankle; that the ligaments were lacerated and torn; that she was absent from work for more than five months; that at the time she was injured she was earning \$10 per week; that she suffered great pain after the accident; and that at the time of the trial her ankle was still weak and she still suffered pain under certain weather conditions; furthermore, that since the time of the accident she was compelled to wear a brace in her shoe.

We cannot say, under the evidence in this case, that the award of damages was excessive.

Finding no reversible error, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

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518 - 19923.

EVA TANGUAY,  
Appellee,

vs.

LEW FIELDS,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

189 LA. 310

STATEMENT OF THE CASE. This is an action brought in the Municipal Court of Chicago by Eva Tanguay, appellee, hereinafter referred to as the plaintiff, against Lew Fields, appellant, hereinafter referred to as defendant, for services rendered by her as an actress, to the defendant, under a contract made in New York on September 4, 1912. The form of the action was in attachment, the American Music Hall Company having been served as garnishes; subsequently defendant entered into an open recognizance before the court, with the National Surety Company as surety; whereupon the attachment was dissolved and the suit proceeded in assumpsit.

Upon trial of the case before the court without a jury, the court found the issues for the plaintiff, assessing her damages at the sum of \$2,000. On this finding the court entered judgment, from which judgment defendant has prosecuted this appeal.

The contract of employment admitted in evidence upon which plaintiff predicated her claim, is as follows:

"New York, Sept. 4, 1912.

"Dear Miss Tanguay:

"I hereby engage you to play the leading female part in "The Sun Dodgers," which is to open on or about October 1st. I agree to pay you the sum of Two Thousand Dollars (\$2000) a week. I also agree to bill you in all advertisement matter, electric signs and newspapers in the following manner:

"EVA TANGUAY  
in

THE SUN DODGERS.

"Your signed acceptance to this letter will be binding.

"Eva Tanguay,  
"C. F. Zittel."

"Lew Fields."

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It was admitted that the plaintiff performed for one and one-half weeks and was paid only one-half week's salary.

// Defendant contends that according to the established custom and usage in the theatrical profession, where an actor or actress is engaged to render services for a new play, and no date is specified in the agreement, the engagement is for the season or run of the play; that the contract offered in evidence was of that character, and that the established custom and usage announced supra must be considered a part of the contract: and that consequently plaintiff's engagement was for the theatrical season 1912-1913, or for the run of the play.

It was admitted by plaintiff that she left the company that was presenting the play, one and one-half weeks after it opened. Defendant contends that she left without his consent and over his protest; that the engagement having been for the entire season or run of the play, plaintiff committed a breach of her contract and was therefore not entitled to recover; and furthermore, that by reason of the breach by plaintiff of her contract, defendant was damaged in a sum greater than the amount claimed by the plaintiff.

Plaintiff maintains that before the play opened, she had notified defendant that she was dissatisfied with her part and would leave the company, and that defendant made no objection and consented to her doing so; further, that in leaving the company when she did, she did not breach her contract, but had a right to do so; and having rendered services for one week, she was entitled to payment therefor.

Plaintiff further denies that there was an established custom and usage in the theatrical profession, with reference to the contract in question, as contended for by defendant.

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MR. JUSTICE PAK DELIVERED THE OPINION OF THE COURT.

In our view, the question as to whether or not there was an established custom and usage in the theatrical profession as applied to the contract offered in evidence, is determinative of the issues in this case.

11 To support his contention as to the alleged custom and usage, defendant testified that he had been a theatrical manager for many years; that he had made many contracts of this kind, not only with plaintiff but with other well known actors and actresses; that there was a custom in the theatrical business in the city of New York, where this contract was made, and elsewhere throughout the United States, ~~infixingxxhisxx~~ that where an actor or actress engages to render services in a new play, and no time is specified in the agreement, the actor is supposed to play for the entire season or run of the play; that the custom is long established and as well known among actors and artists engaged to perform, as among managers and producers.

Frank C. Langley, witness on behalf of the defendant, testified that he had been engaged in the theatrical business for many years, and corroborated defendant as to the existence of the custom as contended for by defendant.

Plaintiff testified that she had been an actress for nearly twenty-five years; that she was familiar with the established custom and usage pertaining to the theatrical business; that there was no well established custom and usage whereby the said contract was binding on the parties for the whole season or run of the play.

Arthur Klein, also called by the plaintiff, testified that he was a theatrical manager and that he was acquainted with the methods and customs prevailing in the theatrical business; that there was no well established custom whereby the period of

On the 1st of July, 1911

at the residence of Mr. J. H. Smith

presented to the Board of Directors

the following report

of the work done during the year

ended, December 31, 1910

For many years past

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but also the public

at large have been

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has been of great value

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service in the contract offered in evidence would be construed as extending over the entire season or run of the play.

Another witness for the plaintiff was Lew Krause, who testified that he was familiar with the theatrical business in general, and that there was absolutely no custom whereby the contract in question would be considered as covering the theatrical season of the year in which the contract was made, or for the run of the play. //

At the conclusion of the evidence, the defendant submitted to the court the following propositions of law:

(1) "The court is requested to hold as a proposition of law that when a contract is entered into the parties to such contract are supposed to have reference to the known usages and customs which entered into and governed the business or subject-matter to which the contract relates, if such usages and customs are uniform, well established and generally acquiesced in and so well known as to induce the belief that the parties contracted with reference to it when nothing is explained in the contract to the contrary.

(2) "The court is further requested to hold as a proposition of law that if it finds from the evidence that at the time and place of the making of the contract between the plaintiff and defendant in evidence there existed a uniform, well established and generally acquiesced in custom that when an actor whose reputation is such that his services cannot be easily replaced is engaged to render services as an actor in a new play, and the time within which the actor is to render such services is not specified in the contract, such actor is obliged to render services for the season or the entire run of the play, and if the court further finds, in addition to the fact that such custom existed, that the plaintiff left the employ of the defendant before the end of the season or during the run of the play without the consent of defendant, the plaintiff committed a breach of her contract and would not be entitled to recover."

Both these propositions the court marked "held."

There is no question but that the defendant relied upon the existence of the custom submitted in these propositions of law, as a defense to plaintiff's claim; and the court having marked them "held," the only issue that remained was for the trial judge to determine whether or not defendant had proven the existence of this custom; and upon that question defendant had the burden of

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proof. Defendant argues that the witnesses whom he called established conclusively the existence of this custom, and the plaintiff just as strenuously maintains the contrary.

The plaintiff rendered a week's services, for which she admittedly had not been paid. Under the terms of the contract she was entitled to receive for those services, the sum of \$2000, and unless the terms of the contract were altered by custom, the right of the plaintiff to recover was manifest.

The court, while it did not see the witnesses for the plaintiff, their testimony having been introduced by deposition, did, however, have an opportunity of seeing and hearing the witnesses called on behalf of the defendant. In finding the issues for the plaintiff, the court evidently was of the opinion that the defendant had not shown by a preponderance of the evidence the existence of the custom contended for.

We have carefully reviewed the testimony on this issue, and cannot say that the finding of the court for the plaintiff was clearly and manifestly contrary to the weight of the evidence.

Finding no reversible error, the judgment of the Municipal Court will be affirmed.

AFFIRMED.

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MAYNE I. BURGESS,  
Appellee.

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BENJAMIN H. BURGESS, et al.,  
On appeal of MORRIS COHEN,  
Petitioner, etc.,  
Appellant.

APRIL 2004

CIRCUIT COURT

OVER COURT.

109 I.A. 513

STATEMENT BY THE COURT. On February 23, 1913, Wayne J.

Burgess filed a bill for separate maintenance against Benjamin H. Burgess. In addition to the allegations with reference to living apart from her husband without fault on her part, she alleged that a sum of money, to-wit: about \$8,000, was on deposit in the Austin State Bank located in Cook County, which was the property of her husband and self and prayed that a receiver be appointed for this sum. On this bill one H. P. Tuchscherer was appointed receiver.

Service was had by publication, and defendant failing to appear, default was entered. The case proceeded to a hearing on May 1, 1913. The testimony of the complainant and her mother was taken, and the court ordered the solicitor for the complainant to prepare a decree.

On May 12, 1913, before the decree was entered, a motion was made by the defendant to enter his appearance, and on the 9th day of June, the husband, Benjamin H. Burgess, was given leave to file an answer; further, that the testimony previously heard should stand, and leave given to the defendant to cross-examine. An order was entered allowing \$740 to the complainant for alimony and solicitor's fees pendente lite, and a certain amount as receiver's fees; from which order no appeal has ever been prayed, and which was not again made the subject matter of any finding in the final decree.

On June 13, 1913, defendant, Benjamin L. Burgess, filed his answer to the bill, denying the allegations of the complainant as

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to her living apart from him without fault of her own, as also the allegations with reference to her interest in the fund on deposit in the Austin State Bank.

On the 16th of July, 1913, one Morris Cohen made motion for leave and authority to garnishee the receiver, H. P. Tuchscherer; and in support of said motion, filed an affidavit. In this affidavit it was alleged by the said Morris Cohen that he had obtained a judgment against the defendant for \$1110.40 and costs; that execution had been issued on the judgment, which was returned, no property found; and that the receiver appointed in this cause had funds belonging to the said defendant. The said motion was denied.

Leave was then granted the said Morris Cohen to file an intervening petition instantly and a rule entered upon the receiver to answer within ten days. The petition was then filed. This petition claimed that the money in the hands of the receiver was the individual property of the defendant, and that the appellee, Mayme S. Burgess, had no interest in said fund; that this fund should be subjected to the payment of the judgment obtained by the petitioner against the defendant, Benjamin H. Burgess.

On July 18th complainant filed replication to the answer of the defendant. The hearing was then proceeded with, complainant and her mother again taking the stand: the depositions of the defendant and other witnesses were read in evidence. This hearing was had on July 23, 1913.

On the 31st day of July, documents purporting to be demurrers, were filed by the complainant and the receiver, to the intervening petition of Morris Cohen. On August 2nd an order was entered that the petition of Morris Cohen be dismissed on demurrer for want of equity, and the demurrers sustained. Appeal was prayed from the order sustaining the demurrers and dismissing the intervening petition and also for refusing permission to the said intervenor to amend his petition.



On the same day a decree was entered by the court, finding that the complainant was living apart from defendant without fault of her own; and among other things, finding that the money deposited in the Austin State Bank in the name of Benjamin H. Burgess was the individual property of the complainant. To the entry of this decree defendant Burgess, and the intervening petitioner Morris Cohen, objected and prayed an appeal to this court.

The appeal of the defendant Burgess was not perfected. However, the intervening petitioner perfected his appeal both from the order of the court dismissing his petition on demurrer for want of equity, and from the decree.

For convenience, the appellee will hereinafter be referred to as the complainant; Benjamin H. Burgess as defendant; and Morris Cohen, the appellant, as the petitioner.

MR. JUSTICE PAM DELIVERED THE OPINION OF THE COURT.

The petitioner in his appeal complains that the court erred (1) in finding that the complainant was living apart from defendant without fault of her own; (2) the court erred in its finding that the fund in the hands of the receiver and on deposit in the Austin State Bank was the property of the complainant and not the property of defendant; and (3) that there was a variance between the decree, the evidence and the bill, and therefore the court erred in entering its decree <sup>without</sup> ~~before~~ amendment was filed to the bill to make the evidence conform to the allegations of the bill.

Complainant challenges the right of the petitioner to intervene, and further, to complain of the decree.

The case of Sightman v. Yaryan Co., 217 Ill. 371, is cited by counsel for both the complainant and the intervening petitioner, on the question of the right to intervene. Our reading of this case, however, impels us to the view that it favors the contention of the petitioner. The court holds that in the absence of any statute cover



ing the subject matter, the right of intervention must be controlled by the general rules in equity as to the answer of the proper parties, but unless a substantial interest in the subject matter of the suit is shown, a person cannot be permitted to intermeddle. However:

"That parties having an interest in the subject matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected."

One of the issues to be determined by the court in the original action was, whether certain funds deposited in the Austin State Bank were the joint or individual property of the complainant or defendant.

The petitioner in his petition set forth the fact that he had recovered a judgment against the defendant: that upon execution issued, the sheriff made a return of no property found: that the fund in the Austin State Bank was the property of the defendant: that it should be subjected to the payment of the lien created by this judgment. The petition further alleged that there was no other property out of which the judgment could be satisfied, and unless this fund was subjected to the lien of the judgment, the judgment would remain unsatisfied. Petitioner's interest, therefore, in this fund, was substantial, and not merely that of an intermeddler.

Before he had filed the aforementioned petition, he had set out these facts by way of affidavit, and had offered this affidavit in support of a motion for leave to garnish the receiver. The court, however, denied him this right, but granted leave to file his petition, and we believe properly so, inasmuch as he had established his right to intervene by the allegations set forth in his petition.

Complainant questions the petitioner's right to complain of the finding of the court that the complainant was living separate

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and apart from defendant without fault of her own. The petitioner maintained that the evidence was insufficient to sustain the decree for separate maintenance. In determining that question, it must be remembered that the defendant failed to perfect his appeal. It is not the defendant who is questioning the sufficiency of the evidence to sustain the decree for separate maintenance, but the petitioner. The only interest the petitioner had in the proceeding was the correctness of the court's finding as to the ownership of the fund which was claimed by both the complainant and the defendant. His right, as represented by his judgment against the defendant, was not thereby impaired. All question as to the sufficiency of the evidence to sustain the decree for separate maintenance are personal to the defendant, and he having failed to perfect his appeal, it does not lie with the petitioner to complain of the sufficiency of the evidence in that regard.

The petitioner further contends that a bill for separate maintenance gives the complainant only the right to obtain a personal judgment against the husband for necessary allowance, and subjects his property to its payment, and that the court therefore was without jurisdiction to adjudicate the property rights of the parties; and he cites in support of this contention the case of Rosenbleet v. Rosenbleet, 112 Ill. App. 408. But a reading of that case shows a different situation than in the case at bar.

In that case the husband perfected the appeal, and upon review the Appellate court found that the evidence did not warrant a decree for separate maintenance; and that therefore the court was without jurisdiction to enter the decree with reference to the property rights of the parties. The Appellate court held that, the allegations in the bill whereby the chancery court obtained jurisdiction having failed of proof, the court was without jurisdiction to enter any orders.





The same situation presented itself in the case of Thomas v. Thomas, 250 Ill. 354, also cited by counsel for the petitioner.

In the case at bar, however, while we have held that the appeal by the petitioner did not raise the question as to the sufficiency of the evidence to support the decree for separate maintenance, we are, however, of the opinion, from a careful review of the evidence, that the court was warranted in finding that the complainant was living separate and apart from the defendant without fault on her part; and therefore, having properly obtained jurisdiction, a court of equity will retain it to do complete justice between the parties: and in doing so, it may grant legal remedies and establish purely legal rights.

It would be contrary to good conscience and equity to have compelled complainant to seek further relief elsewhere, where the court had jurisdiction of all the parties. This principle of law is enunciated in the case of Longshore v. Longshore, 200 Ill. 473, wherein the court quotes from the case of Morrison v. Morrison, 140 Ill. 590:

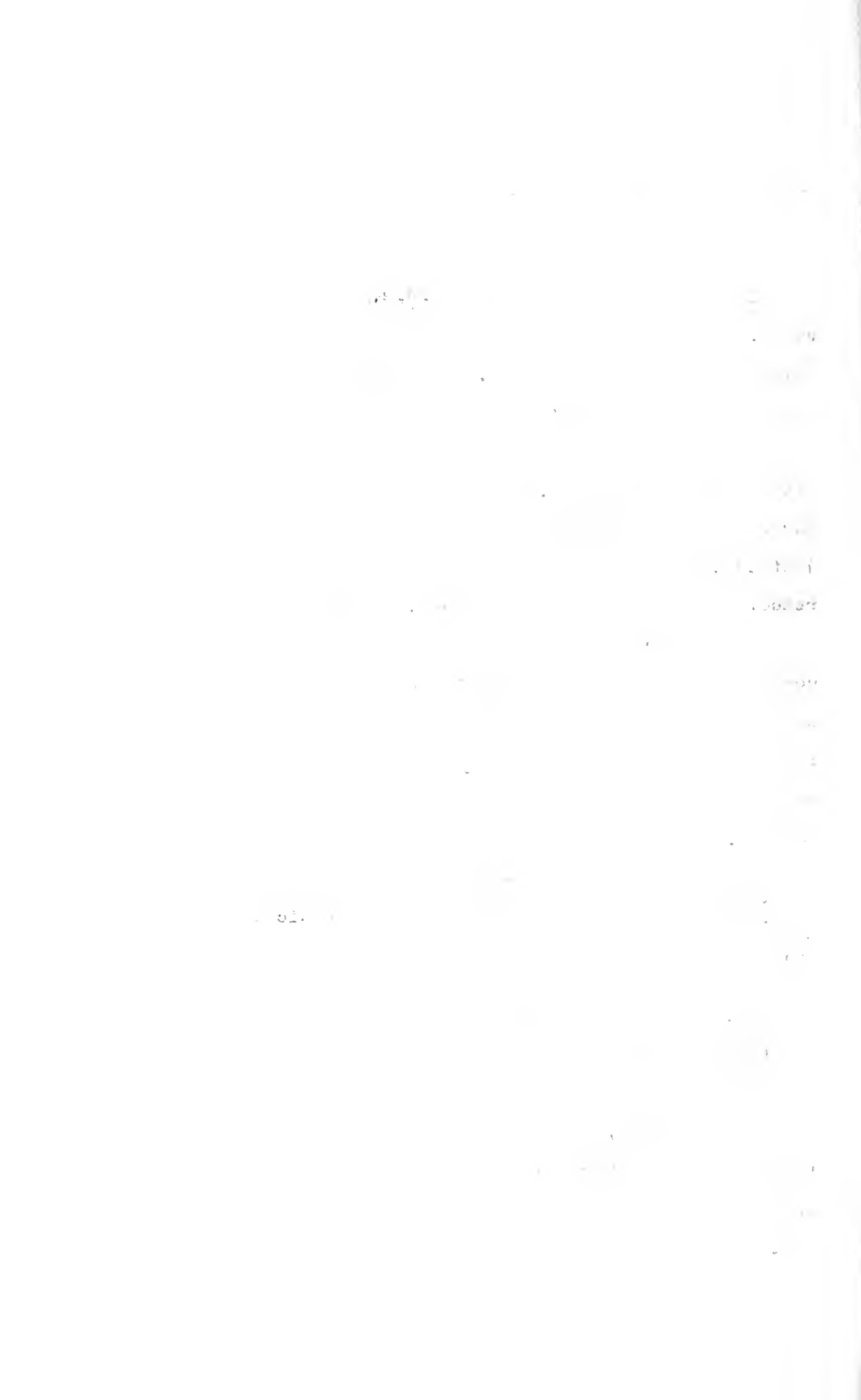
"Equity abhors a multiplicity of suits, and when it has jurisdiction of a subject matter and of the parties in interest it seeks to do complete justice. \* \* \*

And the court goes on to say:

"But it is a well settled rule that when a court of equity has once obtained jurisdiction upon any equitable ground it will retain it to do complete justice between the parties, although in doing so it will become necessary to establish purely legal rights or to grant legal remedies."

The court, therefore, had the right in the case at bar, to proceed and determine the question whether or not complainant or defendant was the owner of the fund on deposit in the Austin State Bank.

The contentions of the petitioner that the finding in the decree as to the ownership of the money on deposit in the Austin



State Bank was manifestly and clearly contrary to the weight of the evidence, and that there is a material variance between the bill, the evidence and decree, we shall consider jointly.

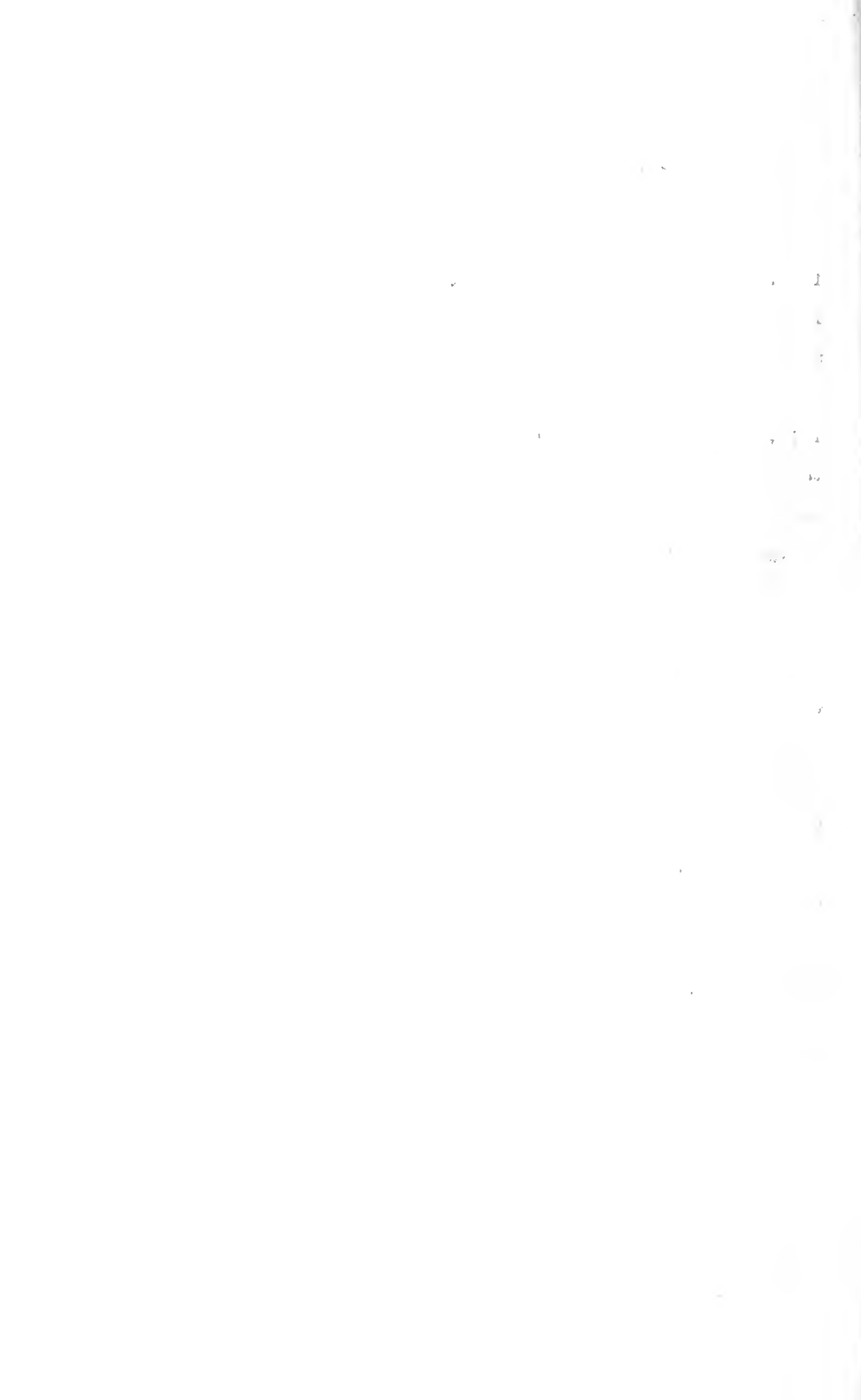
We cannot proceed further in this opinion without commenting upon the condition of the record submitted to this court. It is of such character that to arrive at the true state of facts we must indulge in reasonable presumptions.

This cause was originally heard on the first day of May, 1913, upon the bill taken as confessed. The court simply heard the evidence of the complainant and her mother; afterwards the defendant was permitted to file his answer, which denied all the allegations in the bill and set up in himself the title in the fund on deposit in the Austin State Bank.

Thereafter the petitioner asked for leave to garnish the receiver; this being denied, upon leave obtained, the intervening petition in this case was filed; a rule was entered upon the receiver to answer the petition within ten days; the record, however, does not show any answer filed; nor do we find any ruling on the complainant to answer the intervening petition.

The petition set up as the basis thereof the claim that the judgment in this case represented indebtedness due from the defendant to certain creditors in California, and that the claims of these creditors against the defendant had been assigned to the petitioner; and after the assignment of the claims, to further evidence the indebtedness, defendant executed the note upon which the judgment set forth in the petition was obtained.

Complainant was recalled to the stand, and after giving direct testimony on her own behalf, was cross-examined on all her testimony, including that given at the time defendant was in default. Complainant's mother again testified and was cross-examined in the same way.



At the close of all the evidence for the complainant, to sustain the issues for the defendant and the intervening petitioner, there was introduced, by way of depositions, the testimony of the defendant; John Barrett; Dr. Wm. D. Clarke; Mrs. Howard W. Gray; Howard W. Gray; E. M. Tavanagh; and W. P. Lilienthal. Then the mother of complainant was called in rebuttal. This hearing took place on the 23rd day of July, 1913.

On July 31st, the record shows general demurrers to the petition filed by complainant and the receiver, H. P. Fuchscherer, which read as follows:

"The demurrer of Wayne Willardon Burgess to the intervening petition of Morris Cohen, intervening petitioner, and the said respondent now comes and demurs to the said petition."

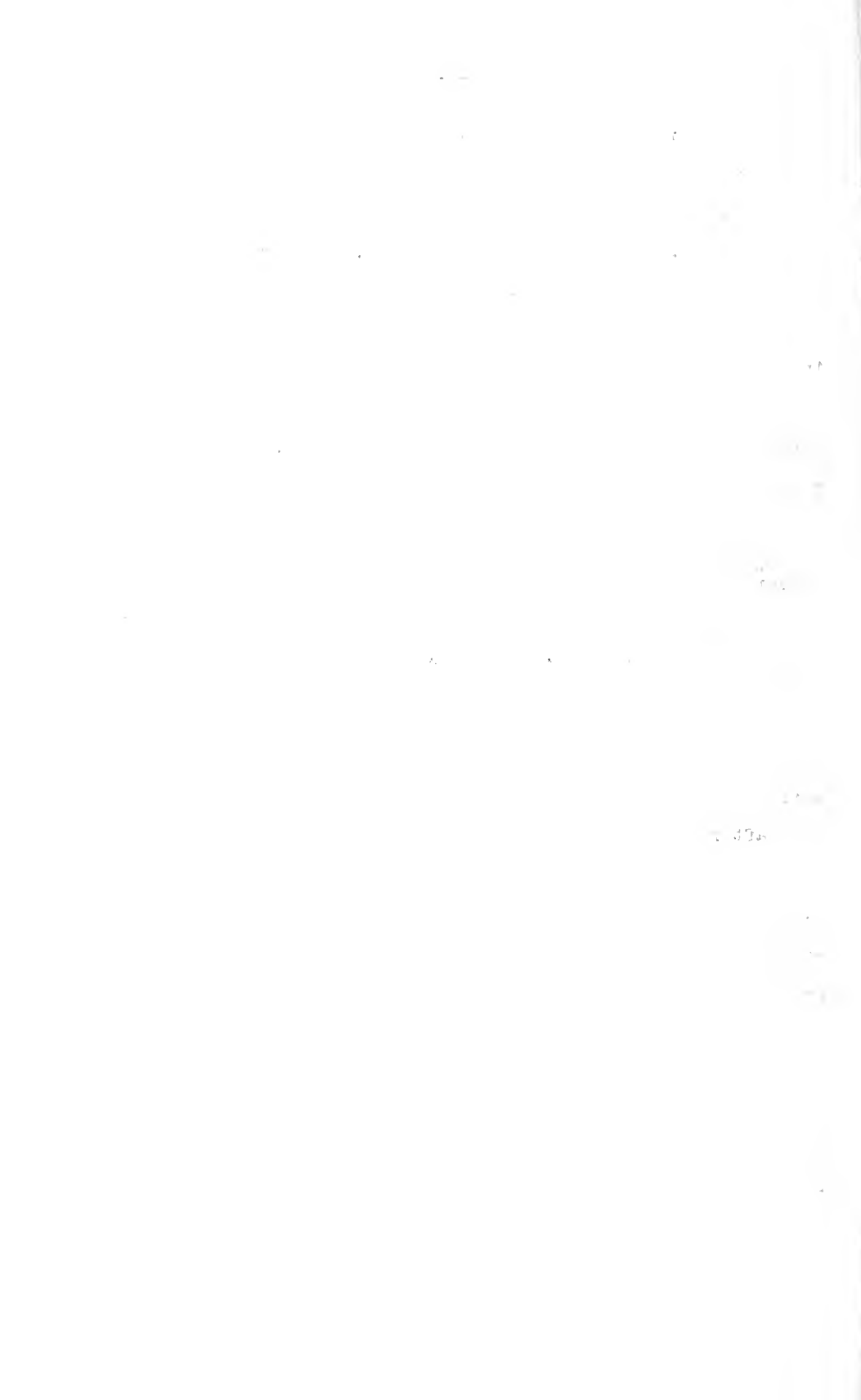
"The demurrer of H. P. Fuchscherer, Receiver to the intervening petition of Morris Cohen, intervening petitioner.

"Now comes the said respondent and demurs to the said petition."

The hearing that took place on the 23rd of July was before the ten days expired for the receiver to file his answer, while the demurrers were filed after the answer was due, and eight days after the hearing.

The record shows appearances on behalf of the defendant and the petitioner; the same counsel who appeared for the petitioner prepared the abstract of record and filed the brief and argument on this appeal.

The hearing could have proceeded only on the theory that issue was joined, not only on the replication of the complainant to the answer of the defendant, but on the presumption that an answer had been filed to the petition by both the receiver and the complainant, or was waived by the conduct of the parties. Consequently, the demurrers that appear in the record of July 31st can only be considered in the light of demurrers to the evidence, and motions made to the court after all the evidence had been heard, to dismiss the petition for want of equity.



The order of August 2, wherein the bill is dismissed and from which the petitioner prayed an appeal, reads as follows:

"Counsel for intervenor Morris Cohen objects to order dismissing petition, and sustained the demurrer, and refusing permission to amend of said intervenor, and excepts and prays an appeal, etc."

The record discloses no request to amend, nor does it show any formal amendment submitted.

The final decree, which is also complained of by the petitioner, was entered on the same day, immediately after the petition was dismissed. These are additional facts which indicate that the petition was dismissed for want of equity, on demurrer to the evidence.

This proceeding is an appeal from both orders; and being by the petitioner alone, narrows the issues presented to us. We have already given as our opinion that the action of the court in finding that the complainant was living separate and apart from her husband without fault on her part is not the subject of review on this appeal.

An additional question presented is, whether or not there is a variance between the bill, the evidence and the decree. The bill, while in one place it sets up ownership of the fund on deposit in the Austin State Bank in both complainant and defendant, repeatedly refers to the fact that the money just referred to was her separate property.

The answer of the defendant, after expressly denying the allegations in the bill, alleges title to the fund to be in the defendant. To this answer complainant filed her replication. Defendant having failed to perfect his appeal, the issue with reference to separate maintenance and the right to possession of the fund in the Austin State Bank had been determined so far as he was concerned.

In the case of *Wightman v. Yaryan Co.*, supra, our Supreme court quotes from the Am. & Eng. Cyc. as follows (p. 390):





"The intervenor must take the suit as he finds it. He is bound by the record of the case at the time of his intervention. If he claims property in controversy, he can interfere only so far as is necessary to prove his right to it. He can not, under such circumstances, contest the plaintiff's claim against the defendant, or raise an issue as to the formality of the pleadings or the regularity of the procedure in the principal cause, nor can he plead exceptions having for their object the dismissal of the action. He cannot change the issue between the parties, nor raise a new one. He cannot insist upon a change in the form of procedure nor delay the trial of the action."

And approves the same in the following language:

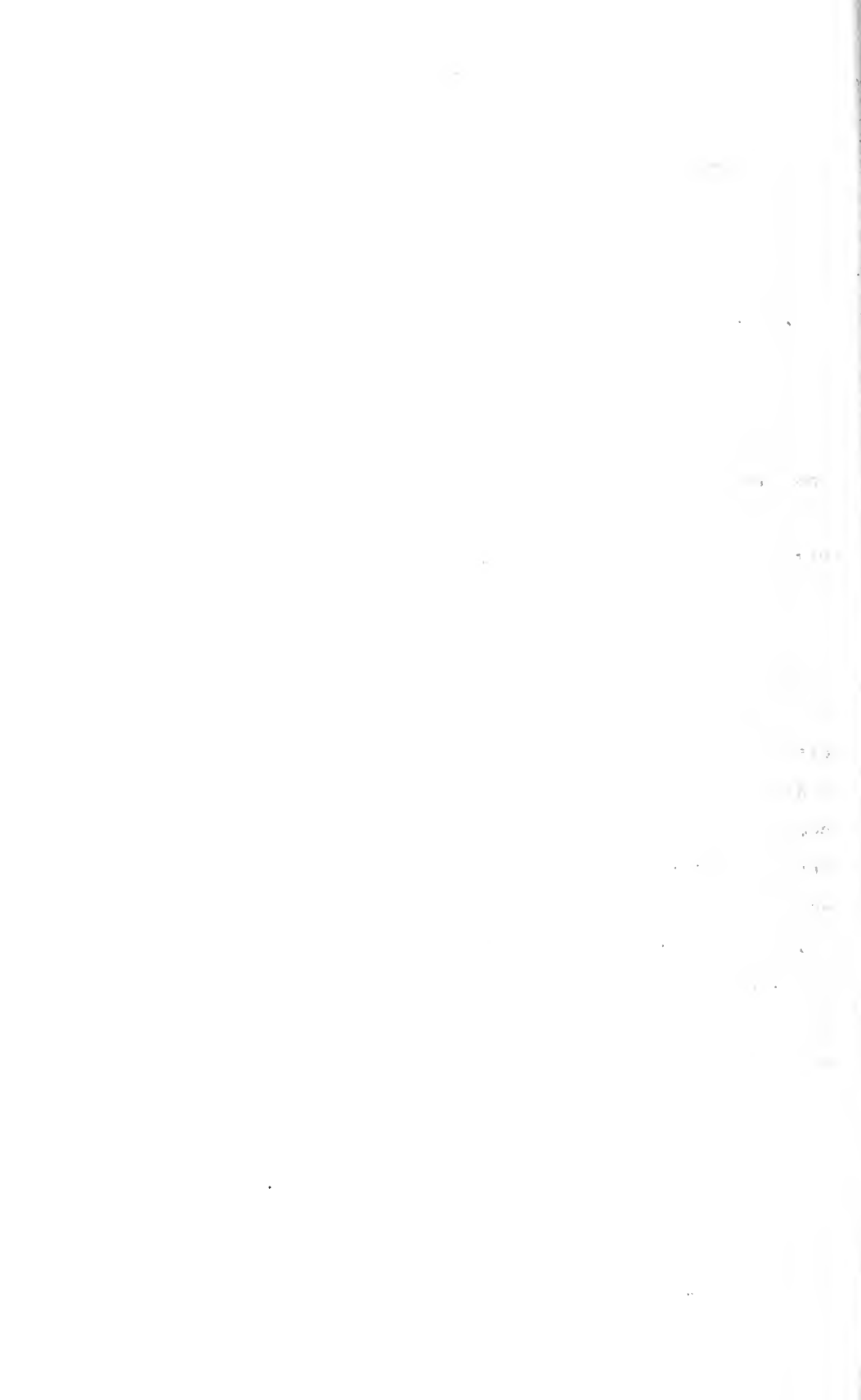
"And each of these several limitations is well supported by the authorities cited in the note."

And therefore, only where the decree interferes with the interest the petitioner had in this fund in the Austin State Bank has he the right to have an issue formed. That was the issue which the court heard upon the petition filed when he reopened the case on July 23rd.

The petitioner cannot complain of the fact that no formal answer was filed to the petition by either the receiver or the complainant. The issues having been formed and the parties proceeding to trial thereon, and the court having heard the evidence presented on both sides and for the petitioner, such proceeding could only continue upon the theory that the hearing was had on answer ore tenus, or that the petitioner waived the formality of an answer; and therefore, upon the issue formed on this petition, the question of a variance between the allegations and the prayer in the original bill and the testimony, is immaterial; and moreover, any benefit of such variance could be claimed only by the defendant who failed to perfect his appeal.

This leaves but one question still to be determined, namely, was the finding of the court on the question of ownership of the fund clearly and manifestly contrary to the weight of the evidence?

At the time of the first hearing on May 1st, the complainant testified as to being interested in all the hotel property at Valensin, California.



When the hearing was resumed on July 23, 1913, the complainant testified in detail as to her right to the particular fund in issue. She testified that the furniture in the hotel at Valensin was her individual property; that she had previously conducted a rooming house in San Francisco, and at the time the hotel was opened her furniture, which included some crockery, glassware, silverware and linen, was brought to the hotel and used therein; that the value of this property was between five and six hundred dollars; that in addition thereto there was other property, viz: her personal wearing apparel and jewelry.

Petitioner relies upon the testimony of the defendant, as to his contention that this was the property of the defendant. Defendant's testimony was by way of deposition. His evidence showed that there had been insurance to the amount of \$11,500 on the hotel and its contents, which was distributed as follows:

|                |                              |
|----------------|------------------------------|
| \$8000         | on the hotel,                |
| 1500           | on the dance hall,           |
| 500            | on the piano,                |
| 1500           | on the contents of the hotel |
| <u>\$11500</u> |                              |

All the insurance, he claims, was in his name. That circumstance, however, is not <sup>necessarily</sup> conclusive against the complainant. Defendant admits that the contents of the complainant's rooming house in San Francisco were used in the hotel; he, however, places the entire value at only \$250.

Defendant, while he admitted the furniture to be complainant's property, testified further that he had loaned her money before their marriage, and that part of the money loaned to her was used in buying the furniture. This fact, however, complainant denies.

There is no testimony on his part that there was any furniture in this hotel, save what she brought down from San Francisco. He placed an insurable value upon the furniture and contents of the hotel, including the wearing apparel and jewelry owned by complainant.

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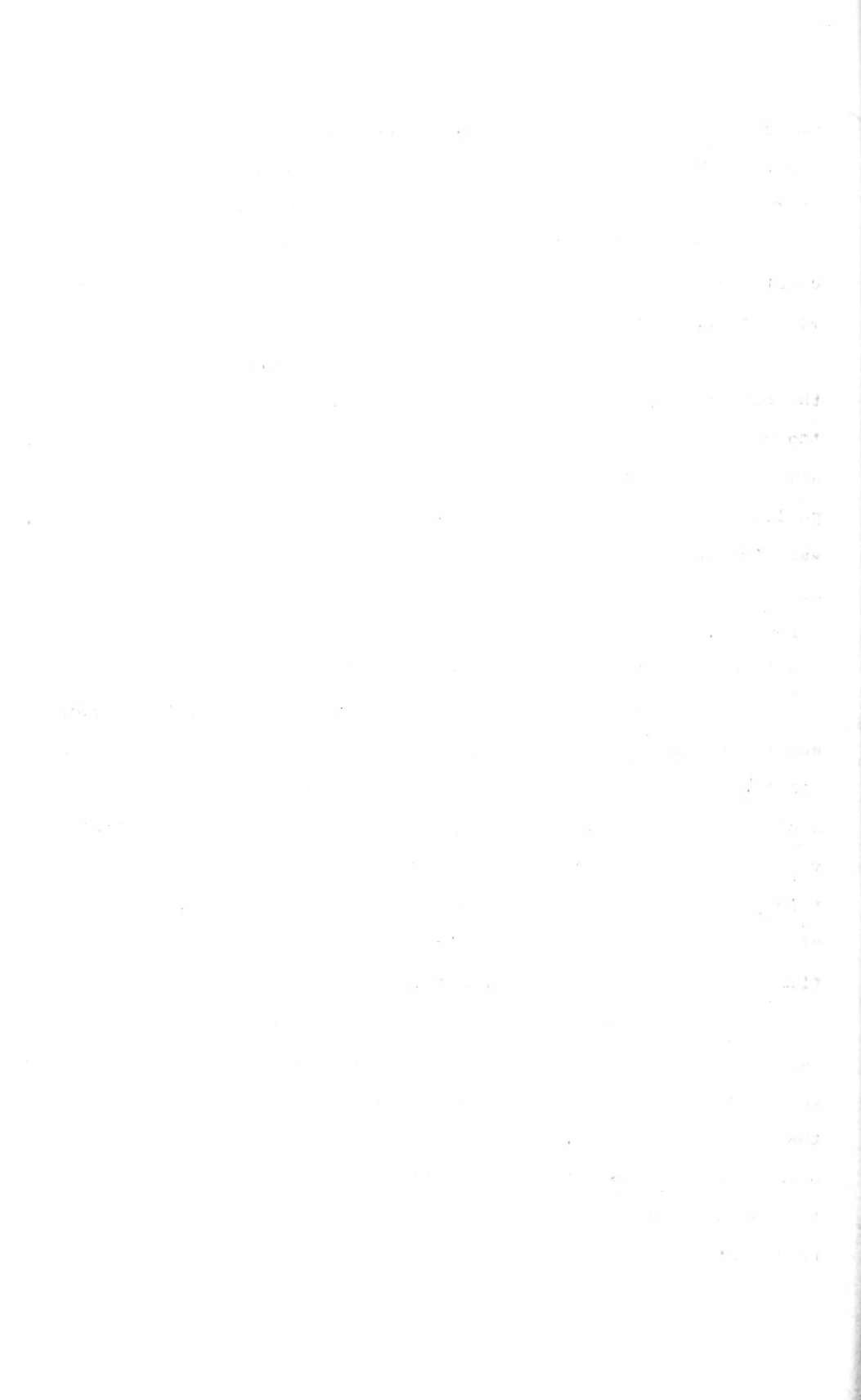
of \$1500. It is fair to presume that, outside of the wearing apparel of the defendant, this sum represented the furniture, her wearing apparel and jewelry, namely, her property.

The amount of this insurance is a circumstance which the court may have taken into consideration when valuing complainant's separate property.

When the property was destroyed by fire, defendant collected the sum of \$10,250, - practically a full recovery. All this money the defendant received and kept, save \$500 that he gave complainant, which was deposited in a bank in San Francisco; and the \$2000 deposited in the Austin State Bank. This \$500, complainant maintains, was given her in payment of a loan made by her to defendant, with money borrowed by her from her mother. This fact is denied by the defendant. The mother corroborates complainant to the extent that she loaned her daughter this money.

Complainant never parted with her title to the furniture, wearing apparel or jewelry; it was destroyed in the fire; payment for the loss was made to the husband; he gave no part of the insurance money to complainant. Complainant was entitled to be paid the value of the furniture, wearing apparel and jewelry; at the time this proceeding was brought, defendant had left her; letters indicate that he intended to remain away, and at the time answer was filed, defendant was in California.

This fund on deposit in the Austin State Bank represented as much complainant's property lost in the fire as defendant's. The answer shows that defendant had made use of all other funds. At the time of the trial, there was but \$1000 left in the bank. If the court gave more weight to the testimony of the complainant than to that of the defendant, it was warranted in finding that this fund represented complainant's interest.



The court did not see the witnesses for the defendant, because all their testimony was in the form of depositions. It did, however, have the opportunity of seeing and hearing the testimony of the complainant and her mother. Moreover, when they testified at the hearing when the case was re-opened, the petitioner and defendant were represented by counsel, and both the complainant and her mother were cross-examined; while at the taking of the depositions in California, complainant was not represented and did not have the opportunity of cross-examining defendant and his witnesses.

It was only after the defendant had learned that the money in question was in the hands of a receiver, that he filed his answer; and that an assignment was made to the petitioner by certain of defendant's creditors<sup>of their claims;</sup> and that to evidence that indebtedness, defendant signed a judgment note, on which judgment was immediately confessed and entered. With all these facts and circumstances in evidence in this case, we cannot say that the finding in the decree by the court that the funds in the hands of the receiver on deposit in the Austin State Bank were the individual property of the complainant, was clearly and manifestly against the weight of the evidence.

In that view of the case, it is not necessary for us to pass upon the additional contention raised by the petitioner, that the court erred in finding that the sum of \$2000, less such sum as had already been paid out by order of the court, should be considered as full payment<sup>of</sup> all claims for alimony or separate maintenance to be paid by defendant to the complainant.

Finding no reversible error, the decree of the Circuit Court will be affirmed.

AFFIRMED.





|                          |   |                  |
|--------------------------|---|------------------|
| LEONARDO CALABREASE,     | ) |                  |
| Appellee,                | ) | APPEAL FROM      |
| vs.                      | ) | CITY COURT       |
| CITY OF CHICAGO HEIGHTS, | ) | CHICAGO HEIGHTS. |
| Appellant.               | ) |                  |

109 I.A. 534

STATEMENT OF THE CASE. This was an action on the case, brought in the City Court of Chicago Heights, Illinois, by Leonardo Calabrese, appellee (hereinafter called the plaintiff), against the City of Chicago Heights, appellant (hereinafter called the defendant). On October 6, 1908, Samuel Calabrese, the thirteen year old son of the plaintiff, while walking along a certain public sidewalk on Fourteenth street, between Center avenue and Green street, in the City of Chicago Heights, stepped upon a loose board in the said sidewalk. The board moved and tripped him, causing him to fall. By reason of this accident the boy sustained a broken leg. Dr. Klinger, a local surgeon, made three unsuccessful attempts to set the broken limb, and on November 13, 1908, the boy was taken to the Michael Reese Hospital in Chicago, where an operation was performed by Dr. Eisendrath, and the broken limb reset. After the operation, the boy remained in the hospital for six weeks, and he then returned to his home, and it was necessary for Dr. Klinger to attend him professionally for four or five weeks thereafter.

The plaintiff brings this suit to recover damages sustained by him through the loss of the services of his son, and for expenses incurred by the plaintiff in endeavoring to have his son cured of the injury and illness caused by the accident. The case was tried before a court and jury, and the latter rendered a verdict in favor of the plaintiff and assessed his damages at \$500. The plaintiff entered a remittitur of \$100 and judgment was entered for \$400. To reverse this judgment, the defendant prosecutes this appeal.

Dr. J. H. H. H.

London

April

Dear Sir

I have the pleasure

to acknowledge

the receipt of

your letter of

the 10th inst.

in relation to

the subject of

the proposed

amendment to

the existing

regulations

concerning

the practice

of the

profession

of the

medical

profession

in the

United Kingdom

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The defendant contends that the plaintiff failed to file a notice with the City of Chicago Heights, in accordance with section 7, chapter 70, Murd's Revised Statutes, 1912, page 1291; that the filing of such a notice was a condition precedent to the right of the plaintiff to bring his suit, and that because of his failure to do so, the trial court should have sustained the motion of the defendant to dismiss the suit in accordance with section 8 of the said chapter.

Sections 6 and 7 of chapter 70, Murd's Revised Statutes, 1912, read as follows:

"6. No suit or action at law shall be brought or commenced in any court within this State for damages against any incorporated city, village or town by any person for any injury to his person unless such suit or action be commenced within one year from the time of such injury was received or the cause of action accrued."

"7. Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages or account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date and about the hour of the accident, the place of location where such accident occurred and the name and address of the attending physician (if any)."

The notice required by section 7 applies only to the case of a person who intends to bring an action against a city, village or town for an injury to his person, and it does not apply to a case like the one now before us. In support of the contention that a notice was required in the present case, the defendant cites the case of Prouty v. City of Chicago, 250 Ill. 322. The reasoning in that case is clearly against the defendant's contention.

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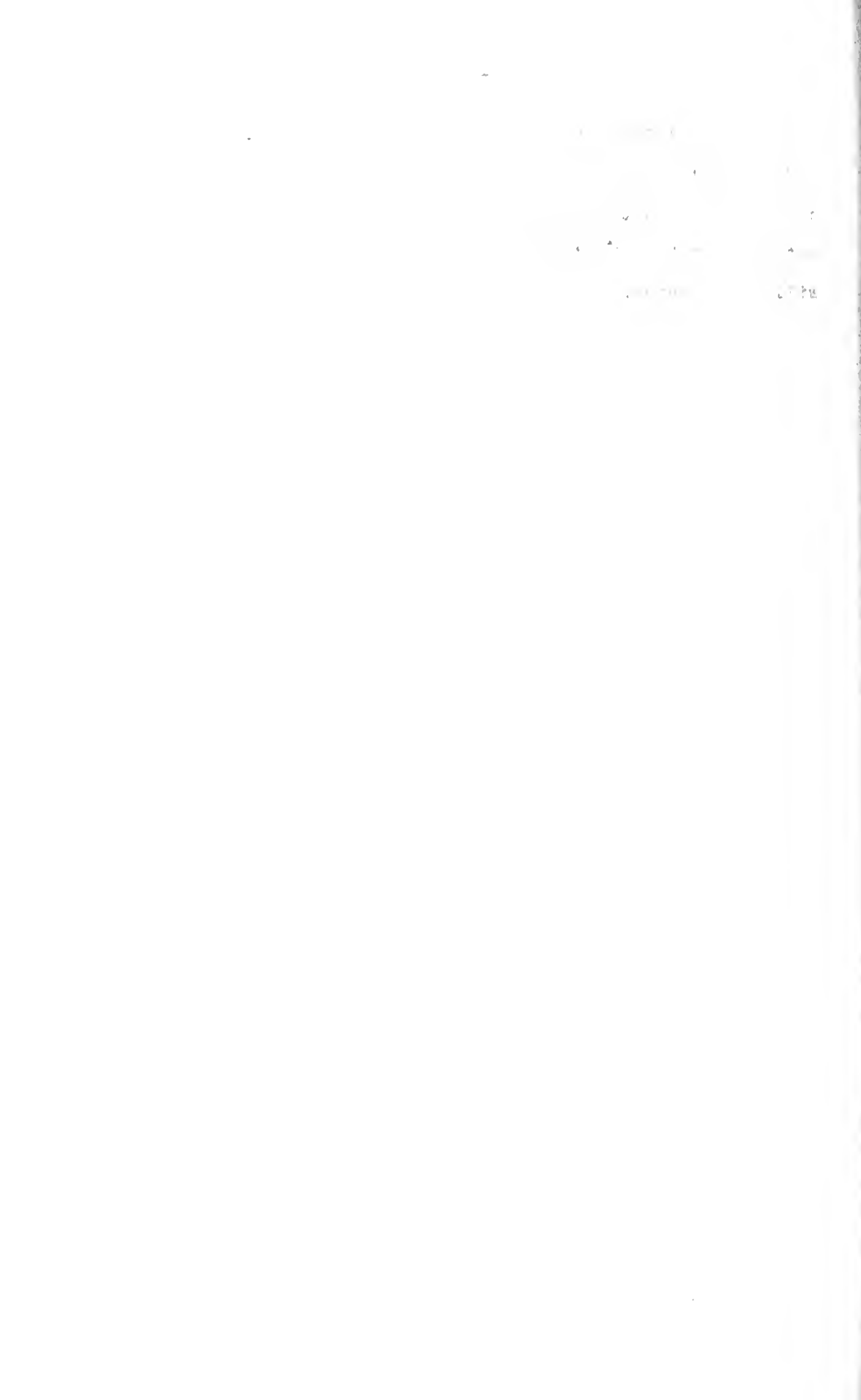
19. 25. 1964

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

The defendant has assigned a number of other reasons why the judgment in this case should be reversed. We have carefully and patiently considered all of those and find them without merit. The judgment of the City Court of Chicago Heights will be affirmed.

Affirmed.



411 - 19813.

FREDERICK LUNDQUIST,  
Appellant,  
vs.  
ALBERT L. QUIST, Admr. Est of  
Dec'd.  
ANDREW M. QUIST, E. P. NELSON  
and ALBERT L. QUIST,  
Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

1891A.535

STATEMENT. This is a bill in equity, filed by the appellant, Frederick Lundquist, against the appellees, Andrew M. Quist, E. P. Nelson and Albert L. Quist, to restrain them from prosecuting a suit in the Municipal Court of Chicago, in which the appellee E. P. Nelson was the plaintiff and the appellant was the defendant, and in which suit the appellee, E. P. Nelson, sought to recover upon a note for \$781.67 given by the appellant to the appellee Andrew M. Quist, and by the latter endorsed to the appellee E. P. Nelson.

The bill alleges that the appellant is a person without education, and without practical business experience; that he and the appellee Andrew M. Quist have been intimate friends for over twenty-five years; that appellant, relying on said friendship and believing that said appellee would take no unfair advantage of appellant's ignorance of business affairs, had numerous dealings and transactions with said appellee from 1890 until January 7, 1911: (the bill sets out a number of dealings and transactions between the said parties); that Andrew M. Quist claims to have an open account against appellant for goods, wares and merchandise sold to, and work and labor performed for, appellant in the pretended sum of \$544 (which claim appellant neither admits nor denies), leaving a balance against Andrew M. Quist and in favor of the appellant of \$344; "that by reason of the trusting relation existing between them" said Quist, "on or about March 2, 1907, by trick and device and false and fraudulent representations, \* \* \*

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induced and caused your orator to make a pretended promissory note payable on demand for \$781.87, and deliver the same to said defendant;" that for many years the appellant had been demanding <sup>said</sup> from the appellee a statement of the account between them; that on or about said last mentioned date, the said Quist made up a statement of account and informed the appellant that there was due to him, said Quist, from appellant \$781.87, but said Quist refused to deliver said statement to appellant until he, the appellant, would make and execute a note payable on demand for the amount aforesaid; that appellant refused to execute said note until he had an opportunity to ascertain the correctness of said statement; that said Quist, to induce appellant to sign said note, promised and agreed to correct any and every error or mistake discovered thereafter in the statement, and to go into an accounting at any time when it should be apparent that the said statement was erroneous in any respect; that appellant relying on the promises and representations of said Quist, executed and delivered said note as aforesaid; that shortly thereafter appellant discovered that said statement was incorrect and refused to abide by it: that the said statement was incorrect in the following particulars: (here the bill sets out certain alleged errors in the said statement): that at various times since the making of the said note appellant has demanded the cancellation and return of said note and an accounting between him and said Quist; that the latter has refused these demands and has frequently threatened to file suit against appellant for the collection of said note; that said Quist, in order to deprive appellant of his lawful and equitable rights and just defenses against said false and fraudulent claim on said note, has conspired with appellee, E. P. Nelson, and caused said Nelson falsely and fraudulently to claim that he, said Nelson, was the owner of said note; that said Nelson on several occasions during 1909 and 1910 demanded payment of said note

The first of these is the fact that the  
 Government has not yet decided whether it  
 will accept the offer of the United States  
 to purchase the Alaska Pipeline. This is a  
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from appellant; that appellee Nelson never became the bona fide owner of said note, and that Andrew M. Quist still is the owner of it; that said Nelson, with the fraudulent intent to deprive appellant of his lawful and equitable defense to said note and of his right to an accounting and adjustment of the respective claims of appellant and said Andrew M. Quist, on February 30, 1911, filed a suit in the Municipal Court of Chicago, against appellant as defendant, to recover \$624.78, alleged to be due on said note, which suit is still pending; that appellant is without adequate remedy in the premises except in a court of equity. The bill prays for an accounting between appellant and Andrew M. Quist, and that the appellees may be enjoined from prosecuting said suit in the Municipal Court. A temporary injunction was entered restraining the appellees from prosecuting the suit in the Municipal Court. A general and special demurrer, ~~xxx~~ filed to the bill by all the appellees, was overruled, and the appellees then filed a joint and several answer setting up an account stated between the appellant and the appellee, Andrew M. Quist, and denying that there had been any fraud, mistake or undue advantage in <sup>the</sup> settlement of the same. A general replication was filed to the answer, and the cause was referred to a master to take testimony and report his findings. The master in his report found that appellant and the appellee, Andrew M. Quist, on March 2, 1907, "got together and adjusted and settled the accounts between them. \* \* \* And it was then and there found that the complainant was indebted to the defendant Andrew M. Quist in the sum of \$581.67. That thereupon the defendant Andrew M. Quist, at the request of the complainant, advanced to the complainant the further sum of \$200, and the complainant thereupon made and delivered to the defendant Andrew M. Quist his promissory note for \$781.67, in full settlement of the account between the complainant and the defendant Andrew M. Quist. That there were no mistakes or errors made

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in said settlement, nor were there any trick, device, false or fraudulent representations made by the defendant Andrew M. Quist to secure said settlement, as charged in the bill of complaint. That the complainant is not entitled to an accounting from the defendants, as prayed for in said bill of complaint." The master recommended that the bill of complaint be dismissed for want of equity. Objections were filed to the master's report by the appellant, and it was ordered that the same stand as exceptions. On a hearing before the chancellor, the exceptions were overruled, and the report of the master was approved and confirmed, the temporary injunction was dissolved and the bill was dismissed for want of equity. A motion of the appellant to continue in force the injunction pending the appeal was denied. The appellant has prayed an appeal from the decree.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

The appellant was engaged in the business of making vests in Chicago, and the appellee Andrew M. Quist was a merchant tailor in the same place, and from the year 1890 until March, 1907, there had been numerous dealings and business transactions between them. It appears from the record that there had never been any attempt to have a settlement of the account between them until March, 1907. At that time the appellant wished to borrow \$200 from the said appellee, and a statement purporting to show the account between them was drawn up by the son of the latter. This showed that there was then due the latter from the appellant \$581.67. The appellant, after receiving this statement from the said appellee, took it home with him and two days later he again met the said Quist. At this time the appellant was given \$200 in cash by the said Quist, and at the same time the appellant signed a note payable to the said Quist for \$781.67. The said Quist contends that after the said statement was given to the appellant, but prior to the receiving

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of the money and the signing of the note by the appellant, there was a full and fair discussion between the parties of the account between them, and it was mutually agreed that there was then due the appellee Andrew M. Quist from the appellant, \$881.37. The appellant contends that he signed the note because he needed the \$200 and because he and the said appellee were old friends; that he implicitly trusted the said appellee and believed that there would be no trouble in adjusting any mistakes that might thereafter be discovered in the said statement of account. The appellant admitted in his testimony that the first time that he ever complained to the appellee Andrew M. Quist, that the statement drawn by the said Quist in March, 1907, was incorrect, was a few days before the suit was started in the Municipal Court to collect the note. This was nearly four years after the signing of the note. It appears from the evidence that after the making of the note, the appellant on several occasions gave moneys to the said appellee. The said appellee claims that these moneys represented payments by the appellant on account of the note. The appellant admits turning over these moneys, but it is not clear from his testimony whether he claims the moneys were payments on account of the note or were loans to the said appellee.

Appellant contends that the defense of an account stated is an affirmative one, and the appellant having denied that there was an account stated between the parties, the burden of proof was upon the appellees to sustain the said defense, and that they have not successfully made out this defense. With reference to this contention it is only necessary to say that we find after a careful examination of the evidence that the master's finding that there was an account stated between the appellant and the appellee Andrew M. Quist is sustained by a preponderance of the evidence.

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The appellant next contends that, even if it be held that the appellees have proven by a preponderance of the evidence an account stated, nevertheless, the appellant has successfully borne the burden of proving that there was fraud, error or mistake, or all three, in the account stated, and that therefore the account should be opened between the parties. It is the law of this state that where parties after a full and fair opportunity of examining and deciding upon their mutual accounts, have adjusted and settled them, the law will not permit a deliberate settlement thus made to be reopened, except upon the clearest evidence of fraud, or mistake in the settlement, and the burden of proving fraud or mistake rests upon the party asserting the same. We have carefully examined the evidence in this case in the light of the rule just stated and we are satisfied that the complainant has not successfully <sup>sustained</sup> ~~xxxxxxx~~ the burden of proving fraud or mistake in the settlement of the account. When all the facts and circumstances in evidence are considered together, it seems reasonably clear to us that there was no fraud or mistake in the said settlement.

We have considered the other contentions made by the appellant, and we find them without merit. The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.



424 - 19827.

19827

CHESTER A. COOK and RAYMOND  
C. COOK, Trustees,

Appellees,

vs.

HELEN M. NEWBOLD and THOMAS  
S. NEWBOLD,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

189 I.A. 537

STATEMENT OF THE CASE. This was a bill in equity brought in the Circuit Court of Cook County, by Chester A. Cook and Raymond Cook as trustees, appellees (hereinafter called the complainants), against Helen M. Newbold and Thomas S. Newbold, appellants (hereinafter called the defendants), to enjoin the alleged violation of certain negative covenants in a certain lease covering a five-story and basement building situated at Nos. 18-22 East Van Buren street, Chicago, and known as the Exchange Hotel. On May 7, 1903, <sup>one</sup> Ira R. Cook leased the building in question to Helen M. Markham (now Newbold), one of the defendants, for a period of ten years, beginning May 1, 1910. After the making of said lease the said Cook conveyed his interest in the premises to complainants in trust and assigned to them, as trustees, the said lease. The lease provides that the first floor of the building may be used as a buffet and restaurant and for other commercial purposes, and that the remaining portion of the building may be used as a hotel, and the lessee covenants that she "will not permit said premises or any part thereof to be used for any <sup>un-</sup>lawful or immoral purpose or for any purpose in violation of the laws of the United States, the State of Illinois, or the ordinances of the City of Chicago, or for any purpose that will tend to injure the reputation of said premises or of the building of which they are a part, or disturb the tenants of such building or the neighborhood and especially said second party will not per-

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The bill alleged a violation of said covenant  
and prayed that the damages -

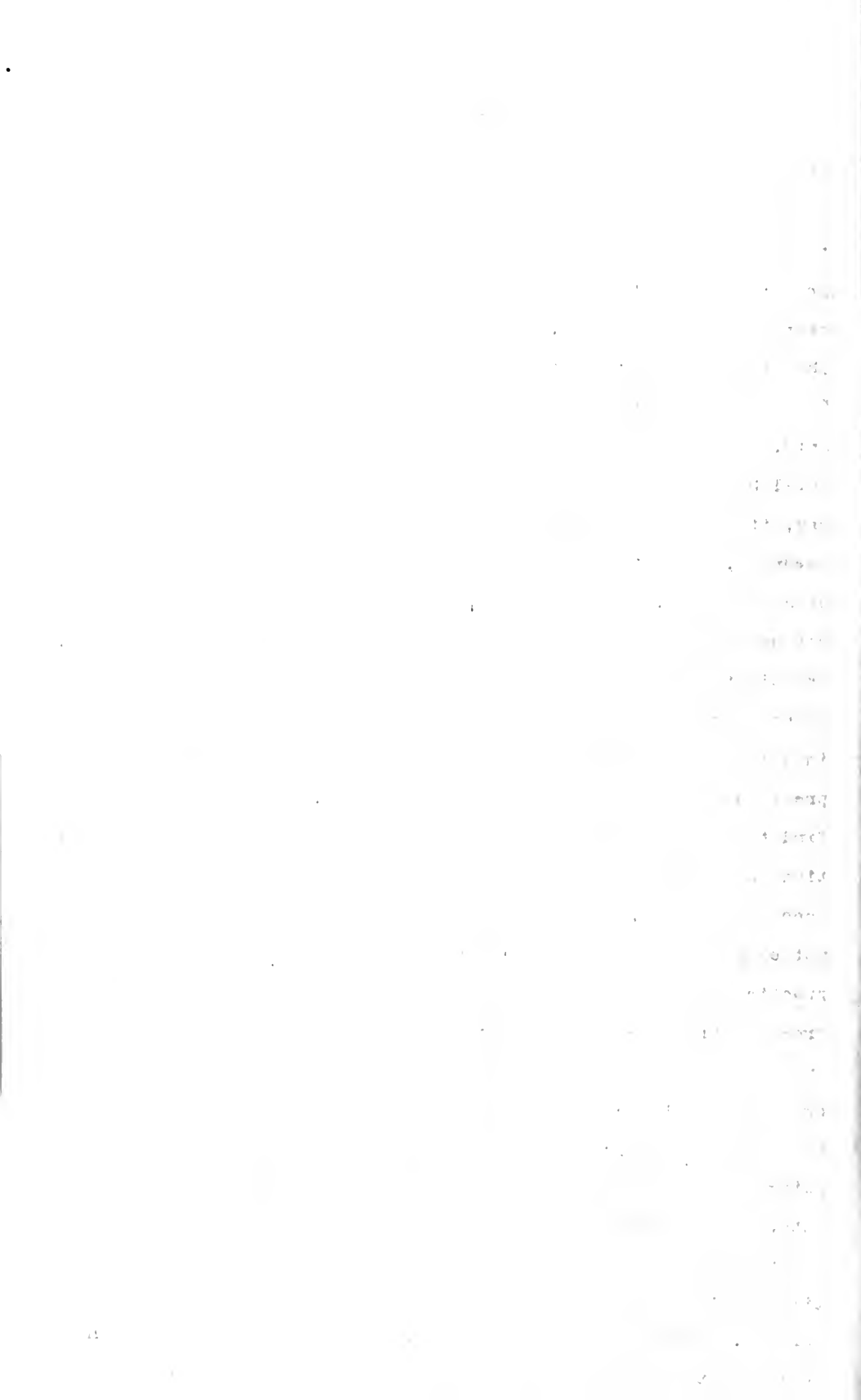


mit or allow any women to frequent or congregate in that part of said demised premises used exclusively as a saloon." The bill of complaint, as amended and supplemented, alleges, in part, that the said Helen W. Newbold has been in possession of said premises since May 1, 1910, and that the said Thomas Newbold, her husband, has acted as her agent in the operation and management of the hotel business conducted on said premises; that said defendants have failed to observe and fulfill the conditions and covenants in said lease; that they have permitted said premises or some part thereof to be used for immoral purposes in violation of the statutes of the State of Illinois and the ordinances of the City of Chicago, and for purposes tending to injure the reputation of said premises and said building; that said hotel has been kept and maintained by defendants as a place for the practice of prostitution and lewdness, and has been patronized by numerous people for such purposes; that the defendants have let rooms in said building for such purposes and have kept a disorderly house to the encouragement of idleness, fornication and other misbehavior; that the defendants have kept upon said premises a house of assignation, contrary to the statutes of the State of Illinois and the ordinances of the City of Chicago, in such case made and provided; that the said illegal acts of the said defendants tend to and have damaged the reputation of said building and caused it to become generally<sup>known</sup> as a place of assignation; that unless such illegal acts are restrained, the complainants are rendered liable to prosecution under the laws of the State of Illinois and the ordinances of the City of Chicago. The bill prays that the damages sustained by complainants may be ascertained; and that the defendants may be enjoined from permitting the premises to be used for immoral purposes, in violation of the laws of the United States, the State of Illinois, or the ordinances of the City of Chicago. The defendants filed separate answers, denying every material averment





of the bill, and asserting that the proceedings were instituted by the complainants for the purpose of obtaining possession of the premises because of the enhancement in <sup>the</sup> rental value of the property. A replication was filed to the answers; the cause was heard by the chancellor, and a decree was entered August 23, 1913. The decree, so far as it is <sup>the</sup> material <sup>containing which were</sup> to this appeal, is as follows: " \* \* \* and that the equities of this cause are with said complainants. \* \* \* The court finds from the evidence that the said hotel has not been used for purposes of prostitution, that is to say, it has not been devoted to the practice of prostitution or lewdness, nor have the defendants kept upon said premises a house of assignation, that is to say, a house devoted to that purpose, nor have they kept a house devoted to the practice of fornication, prostitution and lewdness, but have kept it as a house devoted to hotel purposes. The evidence does not disclose any instance in which the defendants knowingly and willingly permitted said premises to be used for any immoral purpose. But the court does find that on numerous occasions, acts of fornication and prostitution have taken place in said hotel, and that these occasions have been so numerous, that the court must find that the defendants have not exercised sufficient diligence to guard against these immoral practices, and that the complainants are entitled to a greater degree of diligences on the part of the defendants in this respect. And the court further finds that complainants have not knowingly or intentionally permitted said premises to be used or occupied for any such illegal or immoral purposes. In consideration of the foregoing, it is therefore ordered, adjudged and decreed that the defendants, Helen Markham Newbold and Thomas Newbold, their attorneys, agents and employees, be and they are each of them enjoined at all times during the term of said lease from said Ira B. Cook to said Helen M. Markham, dated May 7, 1906, from permitting the said hotel or any part thereof to be used or occupied for any immoral purpose,



or for any purpose that would tend to injure the reputation of said premises, and that the costs of this proceeding be paid by the defendants." To reverse <sup>74</sup>this decree, the defendants prosecute <sup>75</sup>this appeal.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

70 The defendants contend, <sup>76</sup>that the findings of fact of the chancellor, incorporated in the decree, that relate to the alleged violations by the defendants of the covenants of the lease, are adverse to the allegations of the bill in reference thereto, and that the law, applicable to the facts as found, required that the suit be dismissed for want of equity, and that therefore the decree of the Circuit Court of Cook County should be reversed by this court, and the cause remanded with directions to the chancellor to enter a decree dismissing the bill. The complainants contend, <sup>77</sup>that the evidence in the case conclusively shows that the defendants kept and maintained the hotel in question as a place for the practice of prostitution and lewdness, as alleged in the bill, and that it is not material whether the ordering part of the decree is consistent with the chancellor's findings; that the important and controlling question is, does the evidence justify the decretal order? The defendants in reply to this contention say, that the complainants have not assigned cross-error, and that therefore the correctness of the findings of fact of the chancellor cannot now be assailed by them and that the findings are conclusive on this court. <sup>78</sup>

The assignment of cross-errors in a chancery case is the pleading of the party and sets forth the grounds upon which the appellee or defendant in error seeks a reversal of the decree in whole or in part. Such an assignment is not necessary or proper where a party has obtained everything that he claims. One cannot assign cross-error merely because he is dissatisfied with all or some of the findings of fact of the chancellor, embodied in the decree.

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Pelouze v. Slaughter, 241 Ill. 215; Jones v. Ray, 178 Ill.

169; Masonic Fraternity Temple Association v. Breitung, 131 Ill.

App. 164. The complainants in the present case secured, by the ordering part of the decree, everything that they asked, and therefore they had no right to assign cross-error. In this case, the evidence has been preserved, and the complainants are not bound by the findings of fact of the chancellor, and they have the right to appeal to the evidence to sustain the decretal order, and if it appears to us that the decretal order is clearly sustained by the proof, it is our plain duty to sustain the decree. Pelouze v. Slaughter, supra.

We have carefully examined the evidence in this case, and we are satisfied that it clearly and conclusively proves that the hotel in question was conducted by the defendants as a house of assignation, in which rooms were let for the purposes of prostitution and lewdness, and that the said use of the hotel tended to injure the <sup>complainants</sup> ~~plaintiff's~~ property in question. The defendants in their original brief have not questioned the sufficiency of the evidence to support the decree, and their entire argument is based upon the theory that the chancellor's findings of fact are controlling in this court, because of the complainant's failure to assign cross-error. The decretal order entered by the chancellor in this case is in accord with the allegations in the bill and the evidence, and it must be sustained.

Finding no error in this record, the decree of the Circuit Court of Cook County will be affirmed.

AFFIRMED.

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|--------------------------|---|---------------|
| PETER J. STOSKY,         | ) |               |
| Appellant,               | ) | APPEAL FROM   |
|                          | ) |               |
| vs.                      | ) | CIRCUIT COURT |
|                          | ) |               |
| EDWARD ROBE and CORNELIA | ) | COOK COUNTY.  |
| ROBE,                    | ) |               |
| Appellees.               | ) |               |

189 I.A. 540

STATEMENT OF THE CASE. This is an action in the Circuit Court of Cook County, brought by Peter J. Stosky, appellant (hereinafter called the plaintiff), against Edward Robe and Cornelia Robe, appellees (hereinafter called the defendants), to recover on thirty-six promissory judgment notes executed by the defendants on April 20, 1908, and made payable to the plaintiff and secured by a chattel mortgage. Thirty-five of the notes were for \$20 each and one for \$125. The notes were so drawn that one of them fell due each month <sup>in succession</sup> for thirty-six months after the making of the same. The first three notes were paid, and then the defendants refused to pay the remainder and judgment by confession was entered against the defendants as to these on December 19, 1909. The amount of the judgment was \$985. Thereafter, on motion of defendants, leave was given them to plead, the judgment to stand as security for the plaintiff's claim. On December 24, 1908, the defendants filed two joint pleas, one the general issue, and the other a special plea alleging that the execution of the notes by the defendants was obtained by the plaintiff by fraud and circumvention, "that is to say that said plaintiff, at the time of the execution of the said supposed promissory notes, represented to the defendants that such supposed notes were simple promissory notes, and not judgment notes, and that such notes were for the purpose of securing the payment of said defendant Edward Robe to the plaintiff of the amount thereof, in monthly installments, and that the defendant Cornelia Robe would incur no liability

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on her part thereto; that the defendants did not know that said supposed promissory notes were judgment notes; that at the time of the execution thereof they had no opportunity of informing themselves as to the legal effect of said notes, and that they were unable to read and understand the same; that the defendant Cornelia Robe had no interest in the subject matter of said supposed promissory notes nor in the shoe repairing shop located in Oak Park, Illinois, for the purchase of which said supposed promissory notes were given by the defendant Edward Robe to the plaintiff; that the defendants at the time of the execution of the supposed promissory notes, confiding in the acts and in the false and fraudulent representations of the plaintiff, then and there executed the said several supposed promissory notes; and the defendant Cornelia Robe, for the execution thereof, received no consideration whatever, either directly or indirectly; that but for the said false and fraudulent representations of the plaintiff, these defendants would not have executed the said several supposed promissory notes in said declaration mentioned." At the same time a further plea on behalf of the defendant Cornelia Robe was filed alleging that the said promissory notes were executed by her without any good or valuable consideration. The plaintiff thereafter filed replications to the joint plea of the general issue, and to the special plea filed by the defendant Cornelia Robe, and a general and special demurrer to the second joint plea of the defendants. No action seems to have been taken as to the demurrer, but on August 19, 1910, the defendants filed a joint plea alleging that the plaintiff obtained the execution of the notes by the defendants by representing to them that the notes were simple promissory notes, and not judgment notes, and were made for the purpose of securing the payment by the defendant Edward Robe to the plaintiff of the several amounts thereof; that said defendants did not know that the notes were judgment notes and had no oppor-



tunity of informing themselves as to the legal effect of the supposed judgment notes, and that they would not have signed the notes but for the said false and fraudulent representations of the plaintiff. On the same date a further plea was filed on behalf of the defendant Edward Robe, alleging that the plaintiff pretended to be the owner of certain machinery and tools, together with other personal property, represented by the plaintiff to be of the value of \$875; that the plaintiff solicited the defendant Edward Robe to purchase said machinery, etc., for said sum; that the defendant, at the time, was without means to purchase the same, but that the defendant offered to lease said machinery, etc., and to pay therefor the sum of \$20 per month as rent, with the express understanding and agreement that if the defendant paid \$875, said machinery, etc., were to become the property of the said defendant; if on the contrary, the defendant defaulted in the payment of said rent, then he was to forfeit all sums paid, and said plaintiff could again take possession and control of said machinery, etc.; that the said defendant understood and believed that the said notes were made in pursuance of said agreement; that he did not know and had no opportunity to learn the true character of the notes until the entry of judgment on the same. On the same date a further plea was filed on behalf of the defendant Cornelia Robe, alleging that the notes were procured from the said defendant by the plaintiff by fraud and circumvention; that said plaintiff represented and stated to the said defendant that said notes were simple promissory notes, and not judgment notes, and that said notes were for the purpose of securing the payment by the defendant Edward Robe of said several sums in monthly installments of \$20 each, and that the plaintiff informed the said defendant that she would not incur any liability whatever in signing said supposed notes; that relying upon the said statements she signed said notes; that she did not read any



of the said notes, and did not have an opportunity to have the purport or meaning thereof explained to her; that she signed the notes solely because of the representations of the plaintiff that she would incur no liability on her part in so doing. Replications were thereafter filed by the plaintiff to the said pleas. The cause was tried by a court and jury, and a verdict was rendered in favor of the defendants. A motion for a new trial was overruled; judgment was entered on the verdict, and this appeal followed.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From an examination of the record, we are satisfied that if a verdict had been found by the jury in favor of the plaintiff, it would have been amply supported by the evidence in the case. It therefore becomes necessary for us to examine with care certain complaints made by the plaintiff. Instruction No. 1, given at the request of the defendants, reads as follows:

"1. The jury are instructed that the burden of proof is upon the plaintiff to establish by a preponderance or greater weight of the evidence, the facts necessary to his recovery. By a preponderance of the evidence is meant that which, in your opinion, has the greater weight, and unless you believe from the evidence that the plaintiff has so proven his case by a preponderance of all of the evidence, you should find the issues for the defendants."

The facts necessary to make out a prima facie case for the plaintiff were not disputed by the defendants. The defendants relied upon affirmative defenses and the burden of proving them rested upon them. Under such circumstances, it has been held that an instruction like the one complained of is misleading, for the reason that the jury might conclude from it that before the plaintiff could recover, he was bound by law to establish the negative of the special defenses. Cutler v. Pardridge, 182 Ill. App. 350; Rich v. Haffziger, 248 Ill. 485.

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The plaintiff complains of instructions numbered 8 and 9, given by the court at the instance of the defendants. Instruction No. 8 reads as follows:

"VIII. Any wilful misrepresentation of a material fact made with a design to deceive another, and to induce him to enter into a business transaction he would not otherwise enter into, will enable a party who has been overreached to avoid or defeat the enforcement of such business arrangement; and it makes no difference whether the party making the misrepresentation knew it to be false, or whether or not he was ignorant as to the truth or falsity of the representation so made by him, provided the matter stated was material and the party making the same stated it was true, when, in fact, he had no apparently good reason for believing it to be true, while the other party, under the circumstances shown by the evidence, was reasonably justified in relying upon the truthfulness of such statement. And if you believe from the evidence that the defendant, Cornelia Robe, at the time of the signing of the notes in question, relied upon the statement of the plaintiff as to her liability upon such notes, if you believe he made the statement as testified to by said Cornelia Robe, and she was thereby injured and damaged, and was induced to sign said notes, by reason of such representation of the plaintiff, then your verdict should be for the defendants."

There is nothing in the evidence in this case to show that the defendants were not on an equal footing with the plaintiff. They were apparently fully as intelligent as he and as able and competent to handle ordinary business affairs. The alleged misrepresentations by the plaintiff, testified to by the defendant Cornelia Robe, related merely to the legal consequences that would follow the signing of the notes by the last mentioned defendant. In effect the testimony, putting it in the best possible light for the defendants, amounts to this: that she signed the notes solely because the plaintiff told her that the only legal consequence of her doing so would be to prevent her from making any claim as to the shop in case the notes were not paid by her husband. There can be no pretense that she did not understand that she was signing promissory notes. In fact, in all the pleas alleging fraud and circumvention, filed by the defendant Mrs. Robe, it is alleged that the plaintiff, "represented to the defendant Mrs. Robe that such supposed notes were simple promissory notes

Let us first consider the case of a  
uniformly distributed load. In this case  
the deflection of the beam is given by  
the following equation:  
$$\delta = \frac{wL^4}{8EI}$$
  
where  $\delta$  is the deflection,  $w$  is the  
load per unit length,  $L$  is the length  
of the beam,  $E$  is the modulus of  
elasticity, and  $I$  is the moment of  
inertia of the cross-section of the  
beam.

Deflection of a beam

Let us now consider the case of a  
point load. In this case the deflection  
of the beam is given by the following  
equation:  
$$\delta = \frac{PL^3}{48EI}$$
  
where  $\delta$  is the deflection,  $P$  is the  
point load,  $L$  is the length of the  
beam,  $E$  is the modulus of elasticity,  
and  $I$  is the moment of inertia of the  
cross-section of the beam.



and not judgment notes." In the instruction complained of - one that directed a verdict - the jury were told that if they believed the testimony of Mrs. Robe as to the alleged misrepresentations by the plaintiff, and if they further believed that she was induced to sign the notes by reason of the said misrepresentations, and that she was injured and damaged thereby, then the verdict should be for the defendants. This is not the law. The mere misrepresentation by the plaintiff as to the legal effect of the signing of the notes by Mrs. Robe does not constitute fraud at law, and cannot be availed of as a defense to the notes. Kerr on Fraud and Mistake, 99; Latham v. Smith, 45 Ill. 25; First Bank of Manlius v. Garland, 130 Ill. App. 407; Grofut v. Aldrich, 54 Ill. App. 541; Dennis v. Piper, 21 Ill. App. 159. Instruction No. 10 contains the same vice as No. 8.

It is quite apparent that the defendant Mrs. Robe utterly failed to make out her defense of fraud and circumvention, even if it is conceded that the plaintiff represented to her that she was signing simple promissory notes and not judgment notes. This alleged misrepresentation, in itself, would not constitute a good defense in this case where the defendants are seeking to set aside a judgment by confession, for if it appears that the defendants owed the plaintiffs the amount of the judgment, the judgment will not be set aside. Hier v. Kaufman, 134 Ill. 215. And if we further assume that the plaintiff misrepresented to Mrs. Robe the legal effect of the signing of the notes, still she would have failed to make out her defense of fraud and circumvention.

For the errors indicated, we are of the opinion that the plaintiff has not had a fair trial in this case. The judgment of the Circuit Court of Cook County will be reversed and the cause remanded.

REVERSED AND REMANDED.

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tober Term, 1913. No.  
452 - 19855.  
19855

J. P. O'BRIEN,  
Appellee,  
vs.  
ISABELLA CURRAN,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 542

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a suit of the first class in the Municipal Court of Chicago, brought by the appellee, J. P. O'Brien, against the appellant, Isabella Curran, for services rendered the appellant by the appellee as a real estate broker in procuring a customer for a certain 99 year leasehold owned by the appellant. The case was first tried in June, 1911, before a court and jury and a verdict was rendered in favor of the appellee for \$1500. A new trial was granted, and the case was again tried before a court and jury in April, 1913, and a verdict was again returned in favor of the appellee and in the same amount as the first verdict. Judgment was entered on the verdict, and this appeal followed.

It is admitted that the appellee was employed by the husband of the appellant to procure a customer for her said leasehold interest, and the appellee contends that the husband was authorized by the appellant to employ the appellee as her agent in the transaction. It is not denied that the appellee, after he was employed by the husband, procured a customer ready, able and willing to purchase appellant's leasehold, upon the required terms. The contention of the appellant is that she never authorized her husband to employ the appellee as her agent in the transaction. We have carefully examined the evidence and we are satisfied that the appellee made a clear prima facie showing that the appellant did authorize her husband to employ the appellee as

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her agent in the transaction. Two juries have decided the question of the husband's authority in favor of the appellee's contention, and the finding of the jury in the second trial has been endorsed by the trial judge, and we cannot say that the finding of the jury on this question is manifestly against the weight of the evidence.

The appellant contends that the court erred in admitting certain evidence. This contention is predicated upon the assumption that there is no evidence in the case tending to prove that the appellant authorized her husband to employ the appellee as her broker. What we have already said in reference to the first contention of the appellant disposes of this last contention. The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

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October Term, 1933, No.

433 - 19833.

19866

AUTO LIGHT & MFG. CO., a  
Corporation,

Appellee,

vs.

35% AUTOMOBILE SUPPLY CO., a  
Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

139 I.A. 543

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is a suit of the first class in the Municipal Court of Chicago in which the Auto Light & Manufacturing Company, a corporation, appellee (hereinafter called the plaintiff), was the plaintiff, and the 35% Automobile Supply Company, a corporation, appellant (hereinafter called the defendant) was the defendant. The suit was to recover \$1500 for merchandise alleged to have been delivered by the plaintiff to the defendant upon a written contract. In the affidavit of merits filed by the defendant, it is alleged that the defendant "did not order or purchase or receive the merchandise mentioned in the statement of claim of the plaintiff, and is not indebted to the plaintiff for any such goods in any sum; that if plaintiff had a transaction, instead of it being with this defendant, it was with the 35% Automobile Supply Company of New York, and that such transactions were based upon a contract between the plaintiff and said New York corporation." The case was tried before a court and jury and a verdict was returned finding the issues against the defendant and assessing the plaintiff's damages at \$1534.37. After verdict, on motion of the plaintiff, the ad damnum was increased to \$1500. A motion for a new trial was overruled, judgment followed, and the defendant has prayed this appeal.

At the time of the alleged sale to the defendant there existed two corporations having the name, 35% Automobile Supply





Company, one organized under the laws of New York, and the other under the laws of Illinois. A. D. Norwalk was president of both corporations. He owned all the stock in the Illinois corporation and he "controlled the New York corporation" but did not own all of its stock. The evidence does not disclose the exact amount of the stock owned by him in the latter corporation. The plaintiff was engaged in the business of manufacturing a combination lamp and license number for automobiles, called a combination license pad. On June 30, 1911, the organization of the plaintiff as a corporation not having been completed, the transaction involved in this suit was carried on in the plaintiff's behalf in the name of Frank Winslow, who subsequently became president of the corporation, and W. L. Puffer, who subsequently became secretary of it. On the last mentioned date, the New York corporation and Frank Winslow, acting for the plaintiff, entered into a contract, which provided among other things that the New York company was to advertise the license pads manufactured by the plaintiff in a certain monthly circular, from July, 1911, to June, 1912, and to mail not less than 60,000 copies of this circular each month, 5000 of which were to be mailed to dealers. In consideration of this advertising the plaintiff agreed to pay the New York company \$2250; payment of the same to be made in merchandise, consisting of the pads. As the New York company ordered and received pads, the amount of the invoices was to be credited to the plaintiff until the \$2250 was paid. For any invoices in excess of \$2250, the New York company agreed to pay the plaintiff cash. After the execution of this contract, the New York corporation proceeded to advertise the license pads as required by the contract. At the time of the making of the said contract the defendant corporation known as 35% Automobile Supply Company had its place of business at 1508 Michigan avenue, Chicago. Mr. Norwalk testified that the



New York corporation had no regular place of business in Chicago, but that when he was in Chicago it did business at 1508 Michigan avenue.

On the same date that the said contract was entered into between the plaintiff and the New York corporation, A. . Norwalk, at the said Michigan avenue place, handed the following order to Frank Winslow:

"New York, 8/30/11.

Mr. Frank Winslow,  
Riverside, Ill.

Dear Sir:

Please enter our order for one thousand (1,000) combination license pads, as per sample submitted, complete with such numbers as we may designate, and six (6) volt bulbs, at \$2.50 each.

These goods are to be shipped as soon as possible, and order must be completed not later than September 1, 1911.

Terms: ~~30~~ -- 10 days, Thirty days Net.

35% Automobile Supply Company.

By A. . Norwalk,

ABN/SR

Free."

After the giving of the order, the plaintiff delivered 573 license pads and a cord and socket, to "35% Automobile Supply Company, 1508 Michigan avenue, Chicago." It is admitted that the defendant did not pay for these goods. As the plaintiff was unable to collect for the goods delivered, he stopped further deliveries and the order was never fully filled.

The defendant contends that the said order was given by the New York corporation; that the goods were delivered in accordance with the contract between the plaintiff and the New York corporation, and that the plaintiff's claim is against the latter corporation. The plaintiff claims that the order was made by Mr. Norwalk as the president of the Illinois corporation; that the goods were delivered by the plaintiff to the latter corporation, and that the defendant is indebted to the plaintiff for the goods.

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Whether the transaction was with the New York corporation or the defendant corporation was a controverted question of fact in the case. After a careful examination of the evidence bearing on this subject, it seems very clear to us that we cannot say that the finding of the jury is manifestly against the weight of the evidence.

The court instructed the jury orally, and the defendant complains that the court erred in three portions of the charge. From an examination of the record, we find that the defendant did not specifically except to the first portion of the charge that it now complains of, and therefore, it cannot now complain of it. Pecararo v. Halberg, 243 Ill. 95.

With reference to the second portion of the charge complained of, we find that the specific objection urged by the defendant at the time of the giving of the charge was that the court erred in instructing the jury, that in determining the question as to whether the goods were sold to the defendant or the New York corporation, they had "a right to take into consideration the fact that the contract was made at the office of the Illinois corporation, and that the president of the corporation was acting at the time." There is merit in this complaint. The court, in his charge, had no right to single out certain portions of the evidence bearing upon controverted questions of fact and to tell the jury to consider them. All the admitted evidence was for the jury to consider, and it is improper to call their attention to certain portions of it. If this case were a doubtful one on the facts, the defendant would be warranted in insisting that it was harmed by this portion of the judge's charge. We are satisfied, however,

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that under the peculiar state of facts disclosed by the evidence, a new trial would only result in the same finding.

As to the last portion of the charge complained of, the specific exception made to it at the time of the charge was that it was predicated upon the theory that there was evidence to the effect that the defendant accepted and used the pads, and the defendant contended that there was no evidence to support such a theory. It is a sufficient answer to the objection urged at the time of the charge to say that we think there is ample evidence in the record that the defendant corporation accepted and used the pads.

The defendant claims that interest should not have been allowed. To quote from defendant's brief: "Interest can only be recovered in cases of unreasonable and vexatious delay, and cannot be allowed where there is a valid and legal dispute as to the validity of a claim," and defendant contends that this is not a case of unreasonable and vexatious delay. The allowance of interest for money withheld by an unreasonable and vexatious delay of payment is only one of a number of instances in which interest is allowed under the statute. The plaintiff was not claiming interest on the grounds that there had been an unreasonable and vexatious delay of payment of the money alleged to be due it. The merchandise was sold on a written order. It was a sale for cash and for a certain and definite sum, due at a specified time. Under the statute, the plaintiff was entitled to interest.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

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CHARLES BLODGETT,  
Appellant,

vs.

GEORGE W. NEVIUS,  
Appellee.

} APPEAL FROM

} CIRCUIT COURT

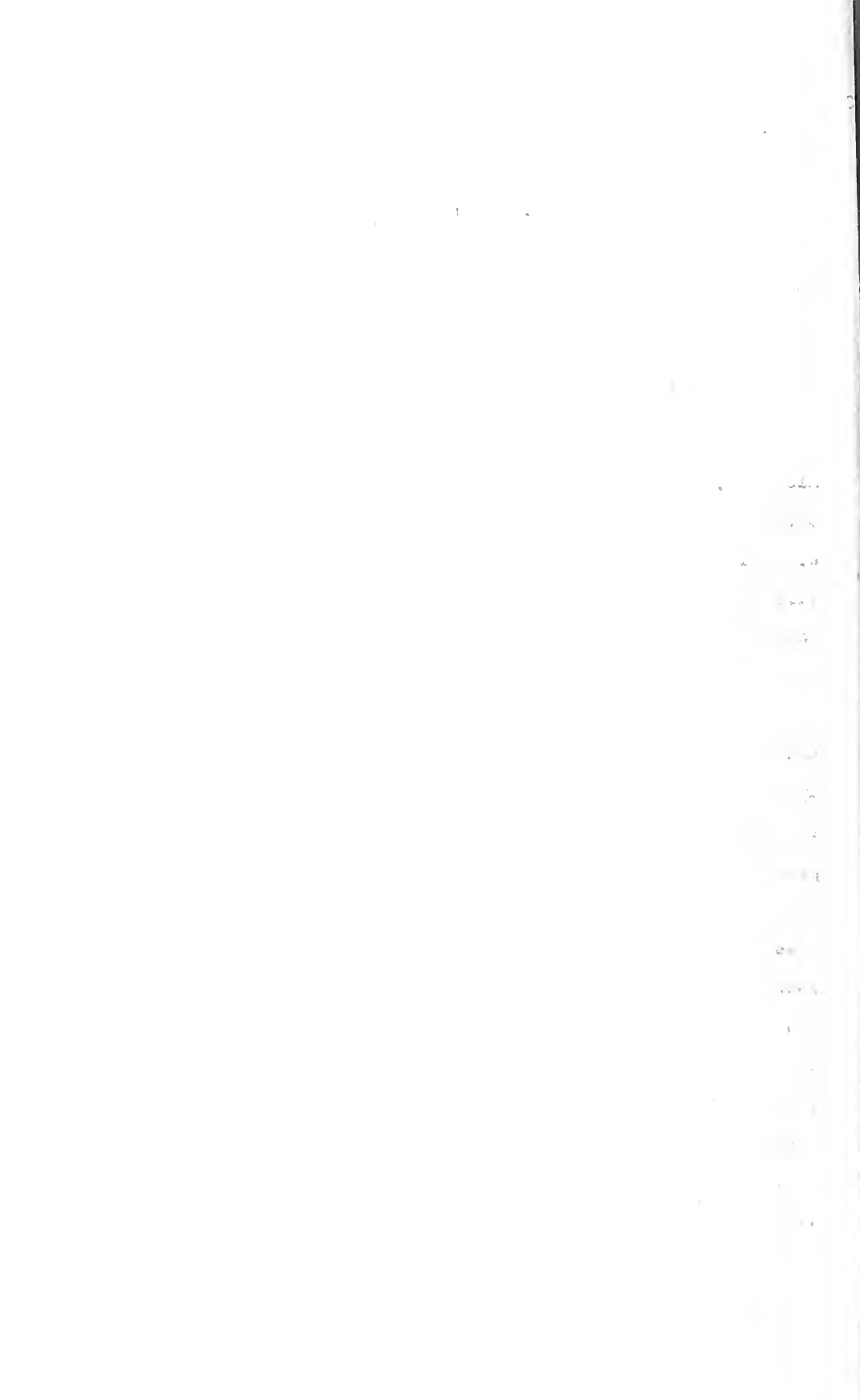
} COOK COUNTY.

189 I.A. 544

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by Charles Blodgett, appellant, hereinafter called the plaintiff, in the Circuit Court of Cook County, against George W. Nevius and Laird W. Nevius as co-partners. At the close of the evidence the plaintiff discontinued the suit as to the defendant Laird W. Nevius. The appellee, George W. Nevius, will be hereinafter referred to as the defendant.

The defendant is a dentist and an expert in the extraction of teeth, and it appears from the evidence that his services are constantly required by many dentists in the City of Chicago. The plaintiff claims that on July 3, 1911, the defendant fractured plaintiff's jaw and otherwise physically injured him by the negligent and unskillful manner in which he attempted to extract a lower right molar tooth of the plaintiff. The plaintiff was 32 years of age at the time of the alleged malpractice. He went to the office of Dr. Upson, a dentist, to have him treat the tooth in question, and the latter decided that the tooth should be extracted and he sent the plaintiff to the defendant to have it removed. The defendant attempted to remove the tooth and a fracture of the jaw resulted. The theory of the plaintiff is that his jaw was broken and he was otherwise physically injured through the negligence and unskillfulness of the defendant. The theory of the defendant is that the tooth in question was imbedded in the bony part of the jaw; that the jaw was badly diseased and weakened

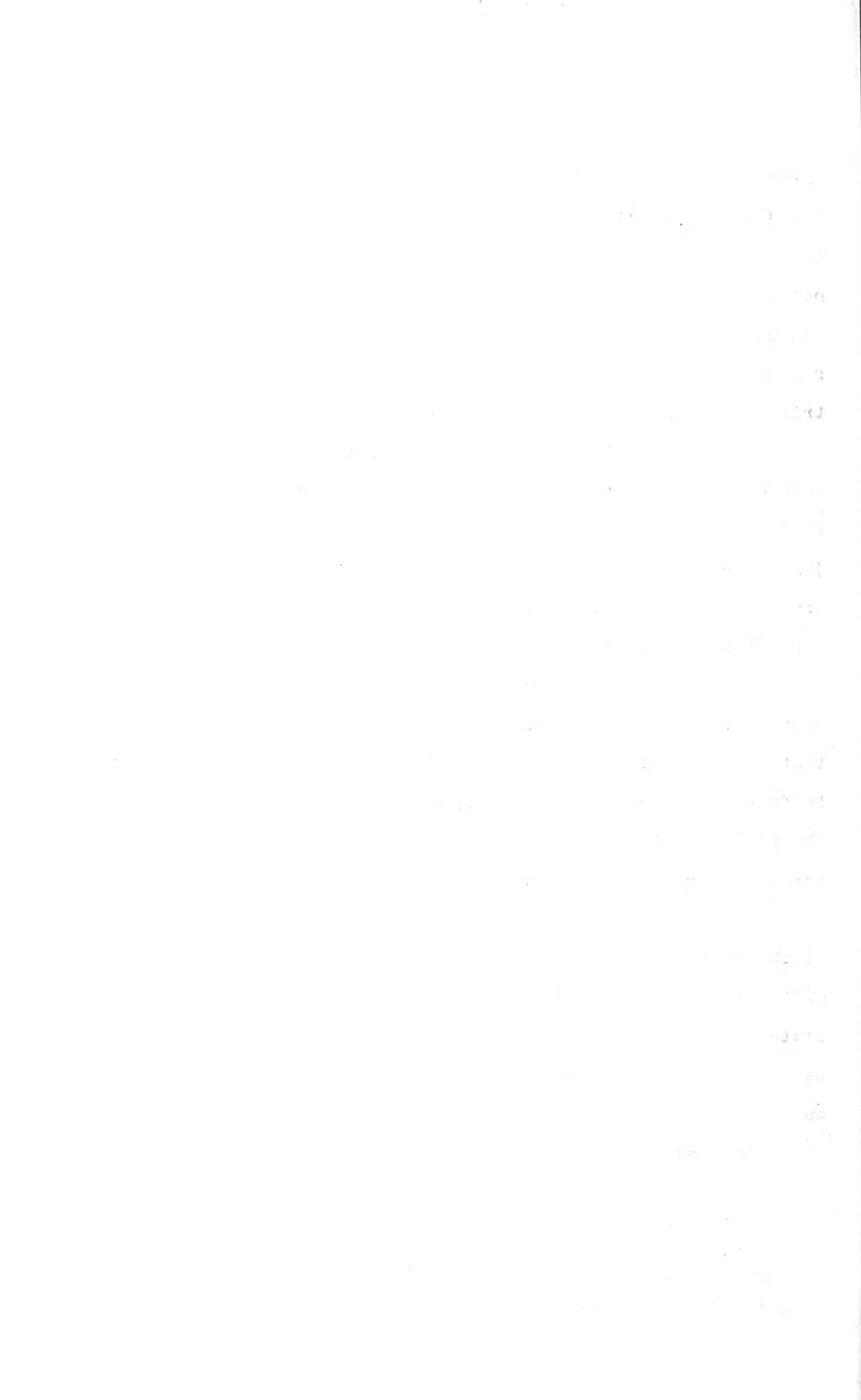


thereby, and that these conditions, together with the fact that the jaw was brittle and reduced in size because of the age of the plaintiff, produced the fracture, and that the defendant was not negligent or unskillful in his treatment of the plaintiff. The case was tried before a court and a jury, and a verdict was rendered finding the defendant not guilty. A motion for a new trial was overruled, judgment followed, and this appeal is prayed.

The plaintiff has assigned only two reasons why the judgment of the Circuit Court of Cook County should be reversed: (1) That the counsel for the defendant in his closing argument to the jury made improper and prejudicial remarks; (2) that the court erred in giving to the jury, at the instance of the defendant, instructions 9 and 10.

It is not necessary for us to pass upon the propriety or the effect of the remarks complained of, as the record shows that the counsel for the plaintiff made no objection to the same - in fact the attention of the court was not called to the remarks. The plaintiff is therefore in no position to now complain of the same. Petersen vs. Eusey, 237 Ill. 304.

The plaintiff complains that instructions 9 and 10, given at the instance of the defendant, are faulty. The only criticism of the instructions made in the brief of the plaintiff is thus stated: "What constitutes due care on the part of a dentist depends upon the circumstances of the particular case. \* \* \* Care must be in proportion to the circumstances." Neither of the instructions directs a verdict and neither undertakes to state what facts would constitute due care or negligence on the part of the defendant in his treatment of the plaintiff. The instructions simply announce certain familiar rules of law defining the degree of skill and care required of dentists who hold themselves out as specialists. If we correctly understand the present contention of



the plaintiff, the instructions in question are not subject to the specific complaint made as to them.

We have heretofore in this opinion treated this appeal as though the plaintiff had made out a prima facie case against the defendant. The defendant strenuously contends that the plaintiff did not make out a prima facie case against him and that the trial court should have directed a verdict for the latter. After a careful consideration of the evidence, we are of the opinion that this contention of the defendant is justified by the proof. The case of the plaintiff is predicated solely upon the fact that a fracture of the jaw and other alleged physical injuries resulted from the treatment of the plaintiff by the defendant. Proof of a bad result is of itself no evidence of negligence or lack of skill. As has been well said, "a physician is not a warrantor of cures. If the maxim, 'See ipsa loquitur,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'." The burden rested upon the plaintiff to show a want of care or skill in the treatment, and that the bad result that followed the treatment was the result of such want of care or skill. No presumption that the defendant was unskillful or negligent follows from the mere fact that the jaw was fractured and that the plaintiff was otherwise injured. As the plaintiff failed to introduce any evidence tending to prove that the fracture or the other injuries alleged was the result of unskillful or negligent treatment by the defendant, a prima facie case was not made out by the plaintiff, and the court should have instructed the jury to find for the defendant.

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It follows from what we have said that the judgment of the Circuit Court of Cook County is correct, and it will be affirmed.

AFFIRMED.





443 - 18913.

EDWARD RECTOR et al.,  
Appellees,  
vs.  
DUNTLEY MANUFACTURING COMPANY,  
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

189 P.A. 562

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the Circuit Court by Edward Rector, Samuel E. Hibben, Frank Parker Davis, Joan B. Macauley and Louis B. Erwin, co-partners under the firm name of Rector, Hibben, Davis & Macauley, against the Duntley Manufacturing Company, to recover a balance of \$2,279.39 alleged to be due plaintiffs for professional services as patent attorneys, rendered from May 1, 1910, to May 1, 1911. The trial resulted in a verdict and judgment against defendant for \$8,800.95, being the full amount claimed by plaintiffs, together with interest by reason of alleged unreasonable and vexatious delay in payment. To reverse such judgment the defendant prosecutes this appeal.

The declaration consists of the common counts, and appellees filed therewith a bill of particulars containing about 250 separate items.

The only information the abstract affords regarding the character of the defense interposed by appellant is as follows:

"Plea of defendant non-assumpsit.

Affidavit of defense.

Notice of set-off by defendant that before and at the time of the commencement of this suit plaintiffs were indebted in the sum of \$18,000. Common counts."

It is conceded that in June, 1909, appellant employed Edward Rector, Samuel E. Hibben and Frank Parker Davis, co-

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partners under the firm name of Rector, Hibben & Davis, to perform certain professional services, and that such employment continued until May 1, 1910, when the co-partnership, consisting of the appellees, was organized; that thereafter until May 1, 1911, appellees performed certain professional services, and advanced certain cash disbursements for appellant, which cash disbursements amounting to \$2,034.02 were repaid to appellees by appellant on January 16, 1911.

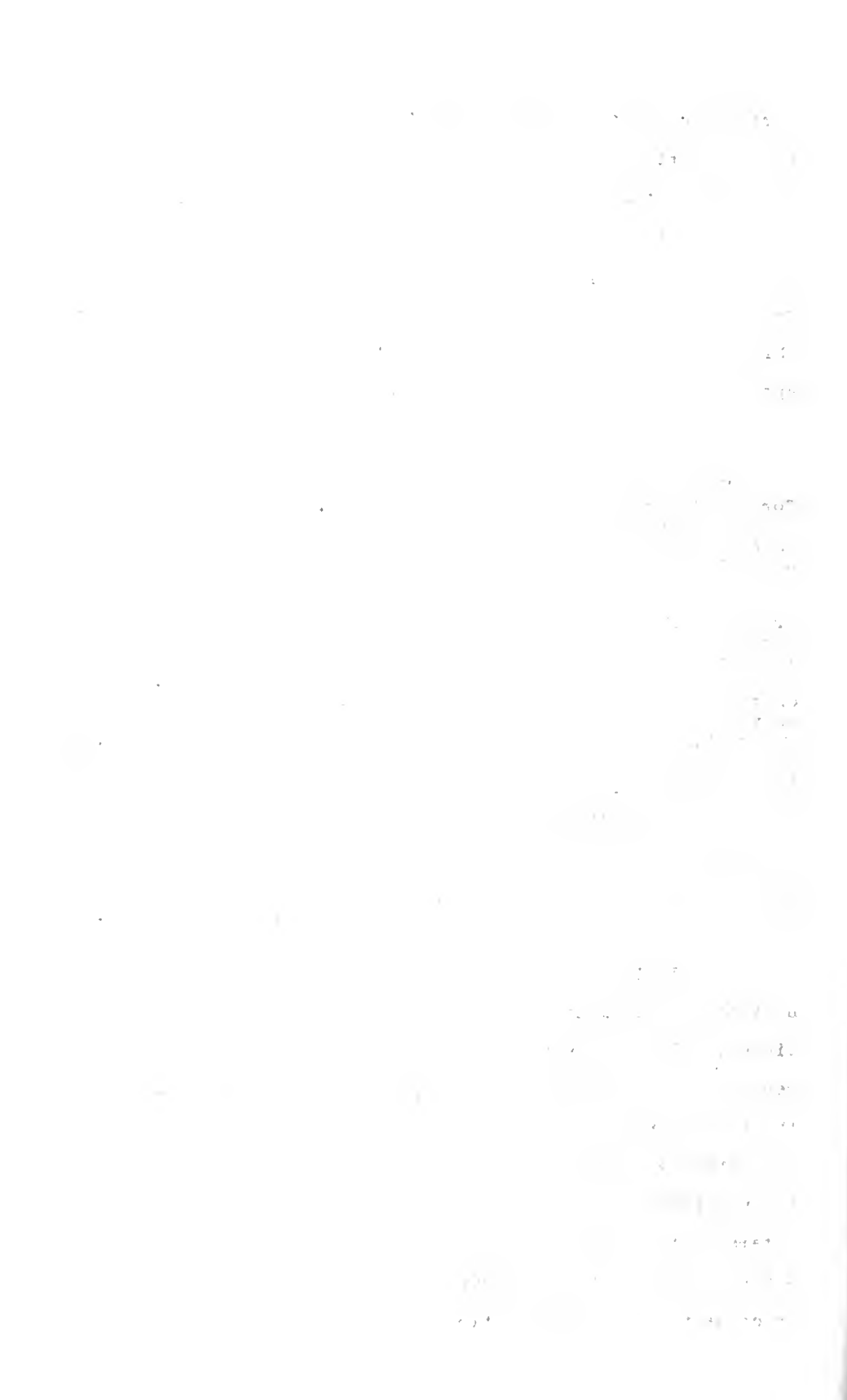
Counsel for appellant say:

"The bill of particulars comprises a large number of items for legal services and for disbursements. The defendant had paid the amount of the disbursements, but contended that the charges for services were grossly excessive, and that plaintiffs had not acted in good faith, and declined to pay their bill.

"The subjects of these charges may be divided into three groups, which are easily distinguishable in the bill of particulars, as well as in the evidence. The first and largest group comprises charges for services in a litigation between appellant and the Keller Manufacturing Company. The charges for the services in this litigation constitutes the only portion of the judgment on which errors are assigned, or, at least, the only ones which will be argued on this appeal. The second group comprises charges for services in a litigation in a suit in which appellant was charged with infringement of a patent on ball bearings. The third group consists of charges for applications for miscellaneous patents.

"We have abstracted only such portions of the evidence as will serve to present the errors complained of by appellant, in relation to the first group. The charges for services belonging to this group amount to between \$4,000 and \$5,000."

It is apparent, therefore, that approximately one-half of the claim of appellees is for services not here questioned. The reasonableness of the value of the services rendered by appellees from May 1, 1910, to May 1, 1911, in the Keller-Duntley litigation is clearly established by uncontroverted evidence, but it is insisted that the only contract of employment for professional services in said litigation was entered into between appellant and the firm of Rector, Hibben & Davis prior to May 1, 1910; that appellant did not employ, or consent to the substitution of, appellees to render profes-



sional services in said litigation subsequent to May 1, 1910; and that appellees can not recover for services rendered in said litigation under the contract of employment with the firm of Rector, Hibben & Davis.

Appellant's alleged set-off is predicated upon the claim that payments to the firm of Rector, Hibben & Davis for services in said litigation/<sup>rendered</sup> prior to May 1, 1910, were sufficient in amount to cover the reasonable value of all the services rendered in said litigation by both firms, including the services in suit, and upon the further claim that in December, 1909, the firm of Rector, Hibben & Davis, by reason of lack of reasonable skill and judgment, or by reason of ignorance, or by reason of bad faith, advised against and prevented a settlement of said litigation, whereby appellant was induced to prolong and continue said litigation.

Samuel E. Hibben, when called as a witness on behalf of appellees, testified, on his direct examination, that he was a member of the firm of Rector, Hibben, Davis & Macauley, and that the firm was organized May 1, 1910. On cross examination the witness testified that the firm of Rector, Hibben & Davis continued until May 1, 1910, when Mr. Macauley and Mr. Erwin were admitted into the partnership then formed under the name of Rector, Hibben, Davis & Macauley; that a partnership agreement was then entered into; that there was no agreement in writing, so far as he knew; that the partners all met together and made an agreement. Counsel for appellant then asked the witness what that agreement was; what was said at the meeting between all the partners, with reference to the partnership; what arrangement, if any, was made between the members of the new firm, as to the prior liabilities of the firm. Upon objections being sustained to said questions, counsel for appellant stated that he desired to prove by the witness, that by the arrangement between the partners of the



new firm, the new partners who were taken in agreed to assume the liabilities of the old firm, and that he further expected to prove by said witness or by other witnesses that there were liabilities then existing to appellant by reason of prior dealings between the former firm and appellant, for which the new firm by reason of that agreement, became liable; that there was money paid by appellant to the prior firm sufficient to pay, if not all, the greater part of the fees for which the present suit was brought, in addition to full payment for the services rendered by the prior firm, whereby the bulk of the present claim could be discharged; that by reason of the fault and negligence of the prior firm, there existed at the time of the formation of the new firm, a liability of many thousand dollars, for which the new firm by agreement became liable to appellant. It is insisted that the action of the trial court in refusing to permit a cross examination of the witness in the respects mentioned constituted prejudicial error.

Under section 53 of the Practice Act, the names of the co-partners constituting the firm of Rector, Hibben, Davis & Macaulay were presumed to be truly set forth in the declaration, and while it was not necessary for appellees in the first instance to prove the co-partnership, the fact that they did so prove it did not justify the line of cross examination attempted by appellant. True, it was incumbent upon appellees, as plaintiffs, to show a joint interest in the alleged contract of employment, and a mis-joinder or non-joinder of plaintiffs might have been taken advantage of by appellant under the general issue, but the line of cross-examination attempted by appellant was not calculated to shed any light upon those questions. That the persons joined as plaintiffs and none others constituted the co-partnership was clearly established, and an inquiry as to the terms of such co-partnership was irrelevant and





not proper cross-examination. The prior dealings between appellant and the firm of Rector, Hibben & Davis were inquired into most fully upon the direct and cross examination of the witnesses, Rector and Hibben.

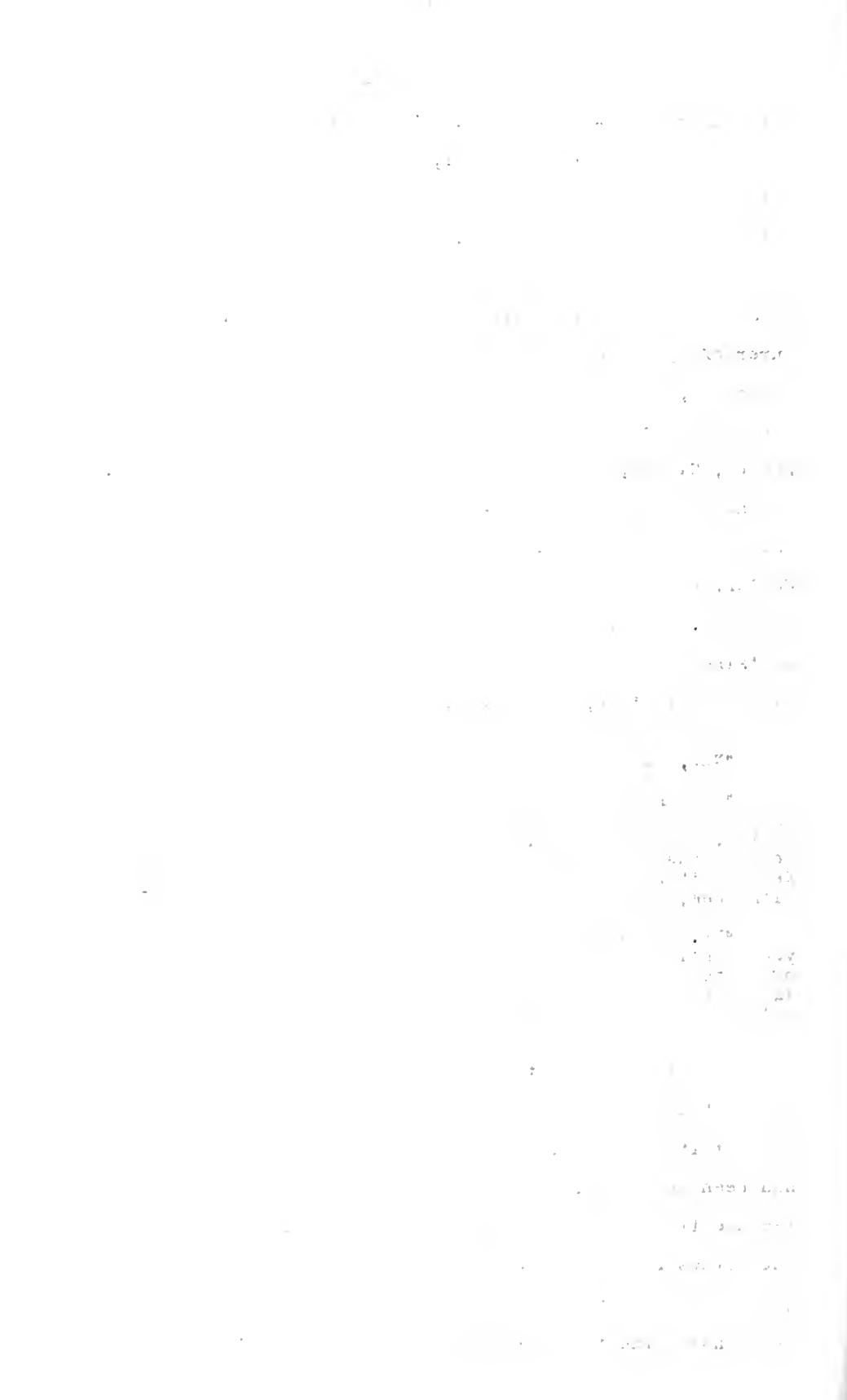
On his direct examination the witness, Hibben, testified that in March, 1911, at the request of W. W. Bishop, treasurer of appellant, he supplied to appellant a typewritten statement, containing 30 to 35 pages, of the entire account of appellant with the firms of Rector, Hibben & Davis and of Rector, Hibben, Davis & Macauley from 1909 up to that time. He then testified on cross-examination that such statement showed the total amount that had been paid out by the firm of Rector, Hibben & Davis and the amount paid said firm for services. It is insisted that objections were improperly sustained to further questions propounded to said witnesses on cross examination, as follows:

"Now, will you state what those sums were?"

"Did that statement which you gave Mr. Bishop show that the Duntley Manufacturing Company had paid to the firm of Rector, Hibben & Davis, between July, 1909, and May, 1910, for various services, the principal part of which were in the Keller litigation, and also for disbursements in connection with them, to the amount of between \$17,000 and \$18,000?"

"Mr. Hibben, if I hand you the statement itself, which you identified a minute ago, could you refresh your recollection so as to state from that what the amount of money was that the defendant had paid to the firm of Rector, Hibben & Davis between the dates I have mentioned, July, 1909, and May, 1910?"

The statement referred to by the witness was then in court in the hands of appellant and was the best evidence of what it contained. If the subject matter of the inquiries had been competent, appellant was not harmed by the rulings, because it could have offered the statement, vouched for by the witness, in evidence, and thus presented to the court and jury uncontroverted proof of the facts sought to be established. Notwithstanding the correctness of the statement was vouched



for by appellees, appellant did not choose to offer it in evidence, but elected to rely upon its effort to preserve a record which might present some error, even though wholly unsubstantial.

Again, it is elementary that debts, to be the subject of set-off, must be mutual between the parties to the action. Damsier v. Bayer, 167 Ill., 547.

It was incumbent upon appellees, in order to entitle them to a recovery, to prove that they were employed by appellant to perform the services sued for. If no contract of employment, either express or implied, for such services was entered into between appellees and appellant, no recovery could be had, and any claimed defense by way of set-off had no place in the case. On the other hand, if the services in question were in fact performed by appellees under such a contract of employment, appellant's defense by way of set-off, arising out of payments made by it to the firm of Rector, Hibben & Davis could not be availed of by it in this suit for services performed by the firm of Rector, Hibben, Davis & Macauley. Cahill v. Dellenback, 139 Ill. App., 380.

It is next urged that appellant did not employ appellees in the Keller litigation, but employed the prior firm of Rector, Hibben & Davis before the formation of appellees' firm, and that appellant's liability continued to the former firm alone, for services rendered by its members in said litigation, after the formation of the new firm.

There is no proof of an express agreement between appellant and appellees, whereby the latter were to be substituted for the prior firm of Rector, Hibben & Davis, in the performance of further necessary legal services in the Keller litigation, but the proof is ample and uncontroverted that appellant had actual notice of the change in the prior firm by the addition to it on May 1, 1910, of two other attorneys, and



of the change then made in the firm name. Following May 1, 1910, appellant not only continued to avail itself of the services in said litigation of Messrs. Rector, Hibben and Davis, but the officers of appellant counseled with and accepted the services of Mr. Macauley as a member of appellees' firm. Monthly statements of account for legal services and cash disbursements by appellees were submitted to and received by appellant, without any suggestion or intimation by it that it had not employed appellees, or that it was not liable to appellees for the reasonable value of their services and for cash disbursements by them. Appellant in fact paid to appellees the entire amount of their claim for cash disbursements, and the jury were not unwarranted in finding that the principal officers of appellant had repeatedly promised to pay appellees' claim for services. Appellant's line of defense predicated upon the theory that its contract for services in the Keller litigation was with the prior firm of Rector, Hibben & Davis and not with appellees is manifestly an afterthought. There is no pretense that appellant, for the same reason, was not liable to appellees for their cash disbursements in the Keller litigation, or for professional services rendered by appellees during the same period in other matters.

The element of consent on the part of appellant that further services in the Keller litigation should be rendered by the new firm of which Messrs. Rector and Hibben, the principal attorneys in the case and who continued to act in that capacity, were members, and the fact that appellant accepted such services, with full knowledge of the change in the firm, serves to distinguish this case from Walker v. Goodrich, 16 Ill., 341, and Hoshier v. Kitchell & Arnold, 87 Ill., 18, cited and relied upon by appellant.

A large part of the evidence in the voluminous record in this case bears upon the issue raised by the contention of



appellant that appellees, Rector and Hibben, in the latter part of the year 1909, by their improper and unskillful advice and conduct, prevented a settlement of the litigation instituted by appellant against the Keller Company for alleged infringement of certain patents relating to vacuum cleaners, whereby appellant, to its prejudice and injury, was compelled to continue the prosecution of such litigation. Upon this issue the court instructed the jury as follows:

"You are instructed that if you find from the evidence that by reason of want of reasonable skill, judgment or negligence or bad faith, the plaintiffs, Rector and Hibben, or either of them, induced the defendant to enter upon or continue in any of the litigation in evidence in this case, and that such litigation was not in furtherance of defendant's interests, you are at liberty to take such facts into consideration in determining the reasonable value of the services rendered by said Rector and Hibben or either of them in such litigation."

It would serve no useful purpose to review in detail the evidence bearing upon the question thus submitted to the jury. There is no substantial basis in the evidence to support the contention of appellant in the respect indicated, and any verdict favorable to appellant upon that issue would have been against the manifest weight of the evidence. While the precise terms of a proposed settlement of the litigation were never fully formulated, it is clear that the adoption of the general plan under consideration would have fallen far short of establishing and preserving any substantial rights of appellant in the patents, which it was claimed the Keller Company were infringing, and that the advice tendered by Messrs. Rector and Hibben with reference to the propriety of the adoption by appellant of the proposed plan of settlement, was sound in law and in fact.

It is said there was no evidence whatever of unreasonable and vexatious delay in the payment of the claim, and, therefore, the allowance of interest thereon was error.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a step function. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a step function with a finite number of steps. The third part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a continuous function with a bounded derivative. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a continuous function with a bounded derivative.

2. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a step function. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a step function with a finite number of steps. The third part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a continuous function with a bounded derivative. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a continuous function with a bounded derivative.

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4. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a step function. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a step function with a finite number of steps. The third part of the paper is devoted to a detailed analysis of the case when the function  $f(x)$  is a continuous function with a bounded derivative. It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is a continuous function with a bounded derivative.

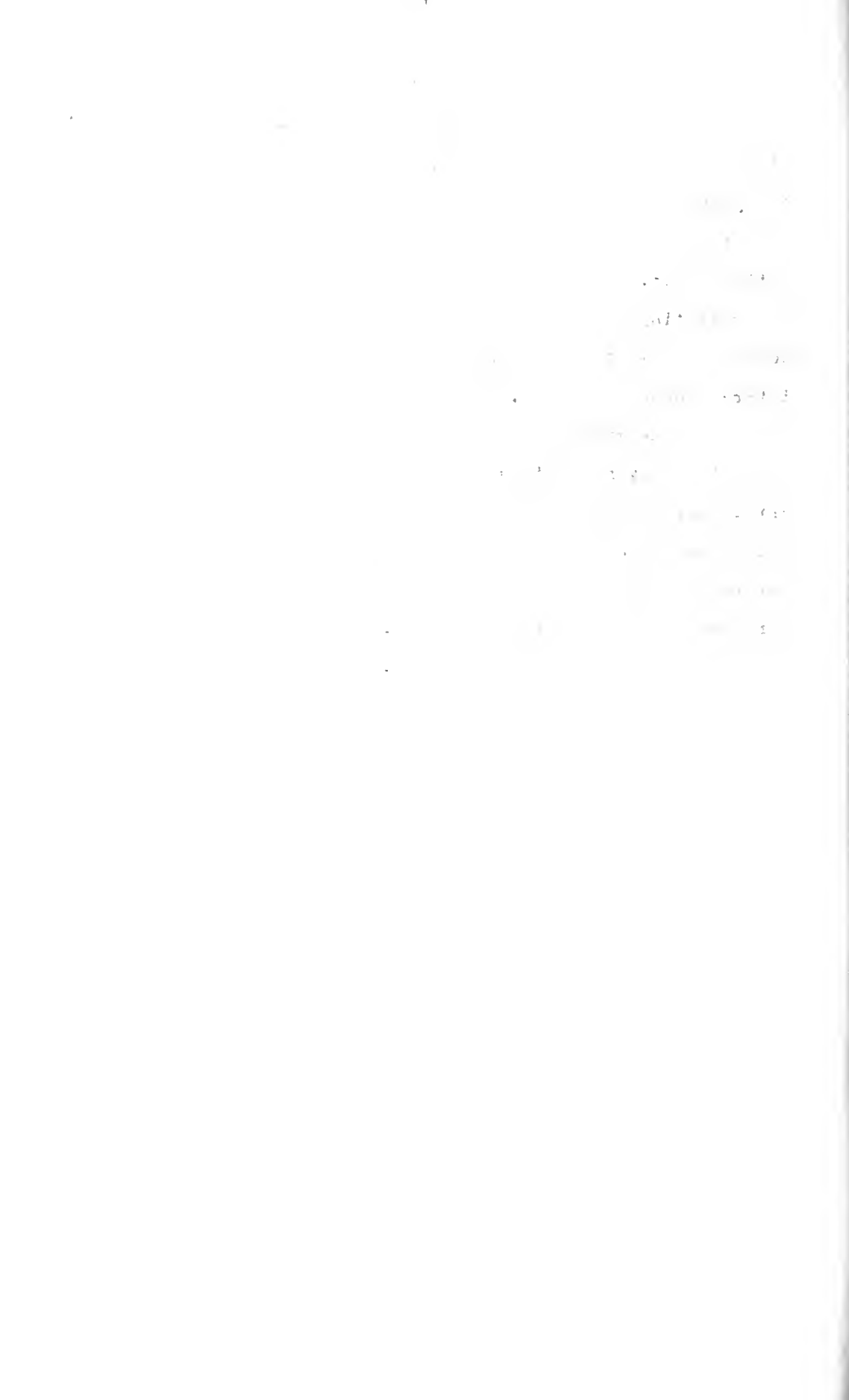


The justness of approximately one-half of appellees' claim is conceded by appellant, and as heretofore remarked, the jury were not unwarranted in finding that the principal officers of appellant had repeatedly promised to pay the entire claim. The good faith of appellant in finally refusing and resisting payment is discredited by the evidence, and we cannot hold that the jury were not justified in allowing interest upon the claim.

The rulings of the trial court upon the instructions are not wholly harmonious or in other respects free from criticism, but as the evidence would have justified no other verdict upon the merits of the case, we are not disposed to reverse the judgment solely for the purpose of enabling the parties to make a faultless record.

The judgment is affirmed.

JUDGMENT AFFIRMED.



175 - 19178.

MANDEL BROTHERS, a corporation,  
Defendant in Error, }

vs. }

CHARLES J. RINGSTROM,  
Plaintiff in Error. }

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BAUME  
DELIVERED THE OPINION OF THE COURT.

189 I.A. 564

In this suit brought in the Municipal Court by Mandel Brothers against Charles J. Ringstrom to recover the price of certain goods sold by plaintiff to the wife of the defendant, a trial by jury resulted in a verdict and judgment against defendant for \$108.71.

The record discloses that the only substantial defense sought to be interposed by defendant in the court below was that during the months of October, November and December, 1911, when the goods were purchased by his wife, his wages amounted to \$120 per month, which amount he gave to his wife during each of said months in money or supplies. The court permitted defendant to show the amount of his wages, but refused to permit him to show that he had given the same in money or supplies to his wife.

It was conceded by defendant that the goods purchased by his wife were within the class properly denominated "family expenses".

Section 15 of the Act relating to Husband and Wife is as follows:

"The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately." Rev. Stat. 1913, p. 1364.

The jury were instructed that the only question

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for them to determine was whether or not the articles sued for, taking into consideration the amount paid and the period within which the purchases were made, were suitable for or adapted to family use, considering the station and condition in life of the defendant.

The defendant requested the court to instruct the jury as follows:

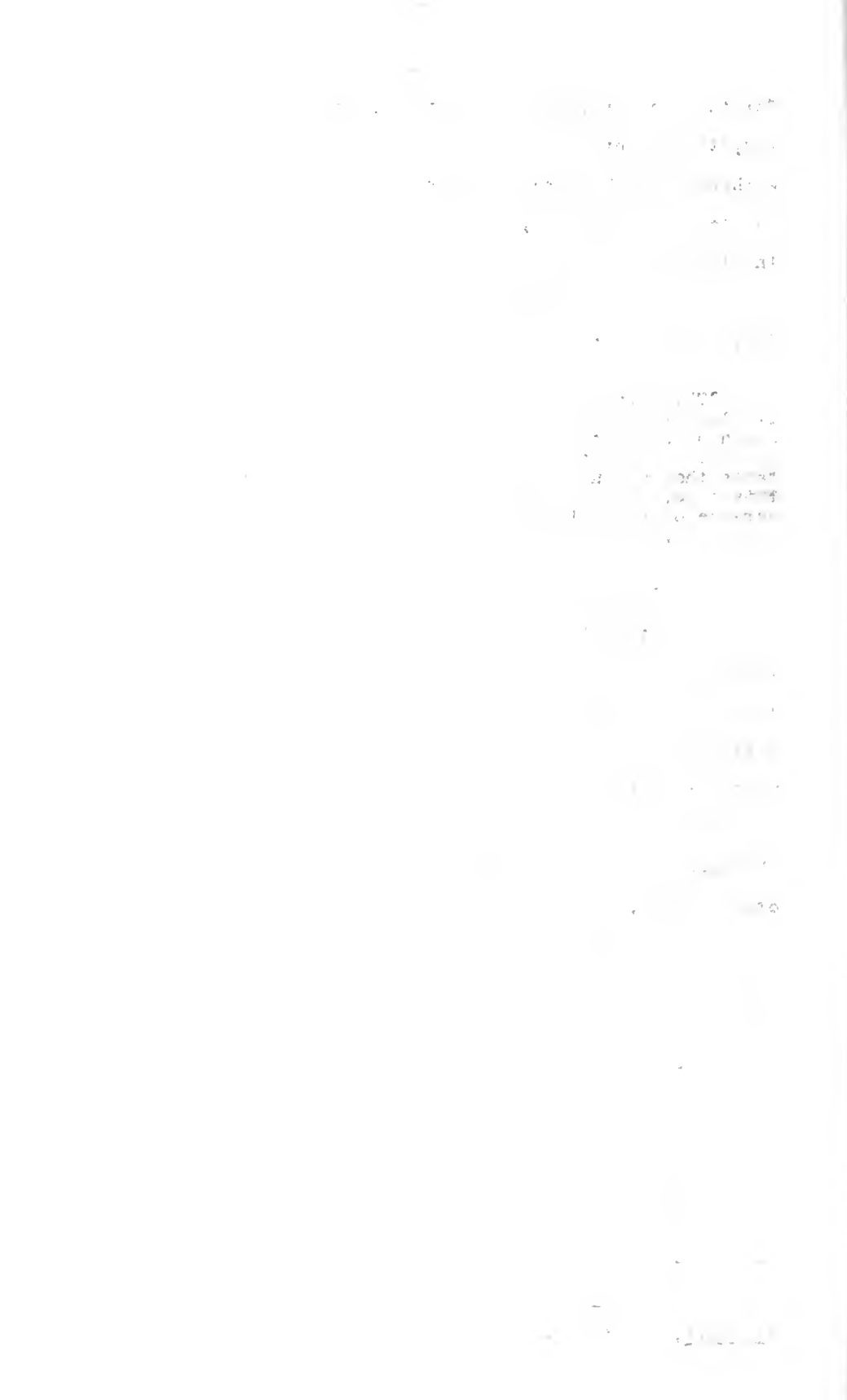
"The jury are instructed that a husband cannot be made liable for debts contracted by his wife in his name, unless she has authority to make such contract; and the tradesman who sells goods to the wife upon the credit of her husband takes the burden of establishing such authority; and in this case, unless such authority has been shown by a preponderance of the evidence, the verdict should be for the defendant."

This request was refused.

It is insisted by plaintiff in error that the section of the statute above quoted does not change the common law rule relating to the liability of the husband for necessities purchased by the wife, and which depends fundamentally upon authority from the husband, and that the presumption of authority from the husband may be rebutted by proof that the husband made sufficient provision for the wife in some other manner.

Assuming that the common law rule is correctly stated by plaintiff in error, we cannot give our assent to the doctrine that the statute does not change the common law rule. On the contrary, we are clearly of the opinion that the statute is in derogation of the common law, and enlarges the liability of husband and wife, either jointly or severally, for family expenses. The expression "expenses of the family", as employed in the statute, is not synonymous with "necessaries". Hyman v. Harding, 162 Ill., 357.

Compton v. Bates, 10 Ill. App., 78, and Gaffield v. Scott, 35 Ill. App., 317, relied upon by plaintiff in



error, were decided without reference to the statute and are not in point.

The liability sought to be enforced in this case is one created by the statute, and is not dependent upon an authorization by the party sought to be held liable.

In Hudson v. King Bros., 23 Ill. App., 118, it was said:

"The consent and action of both is not required, that goods purchased for any individual member of a family, and used by him exclusively, shall constitute a family expense within the meaning of this section."

In Houck v. Smith & Sons, 46 Ill. App., 64, it was held that the liability does not arise from a promise, express or implied, nor does it rest upon contract obligation, but upon a statutory duty imposed by the law of the land upon those occupying the relation of husband and wife. To the same effect is Arnold v. Keil, 81 Ill. App., 237.

In Hysen v. Harding, 163 Ill., 357, where it was sought to hold the husband liable for a ring purchased by the wife, the question of the wife's authority to make the purchase was a proper subject of inquiry because the thing purchased was neither a necessity nor a legitimate family expense.

The trial court instructed the jury as favorably for plaintiff in error as was permissible under the law, and the instruction requested by plaintiff in error was properly refused.

Within the issues actually in controversy and which were submitted to the jury in the trial court, no error intervened prejudicial to plaintiff in error, and the judgment is affirmed.

JUDGMENT AFFIRMED.





March Term, 1910, No.

305 - 18810.

(721)

LAWDALE STEAM DYE WORKS,

Appellee,

ALICE L. BEAN

vs.

COURT REPORT,

CHICAGO TRAIL MOTOR COMPANY,

Appellant.

TRAIL MOTOR.

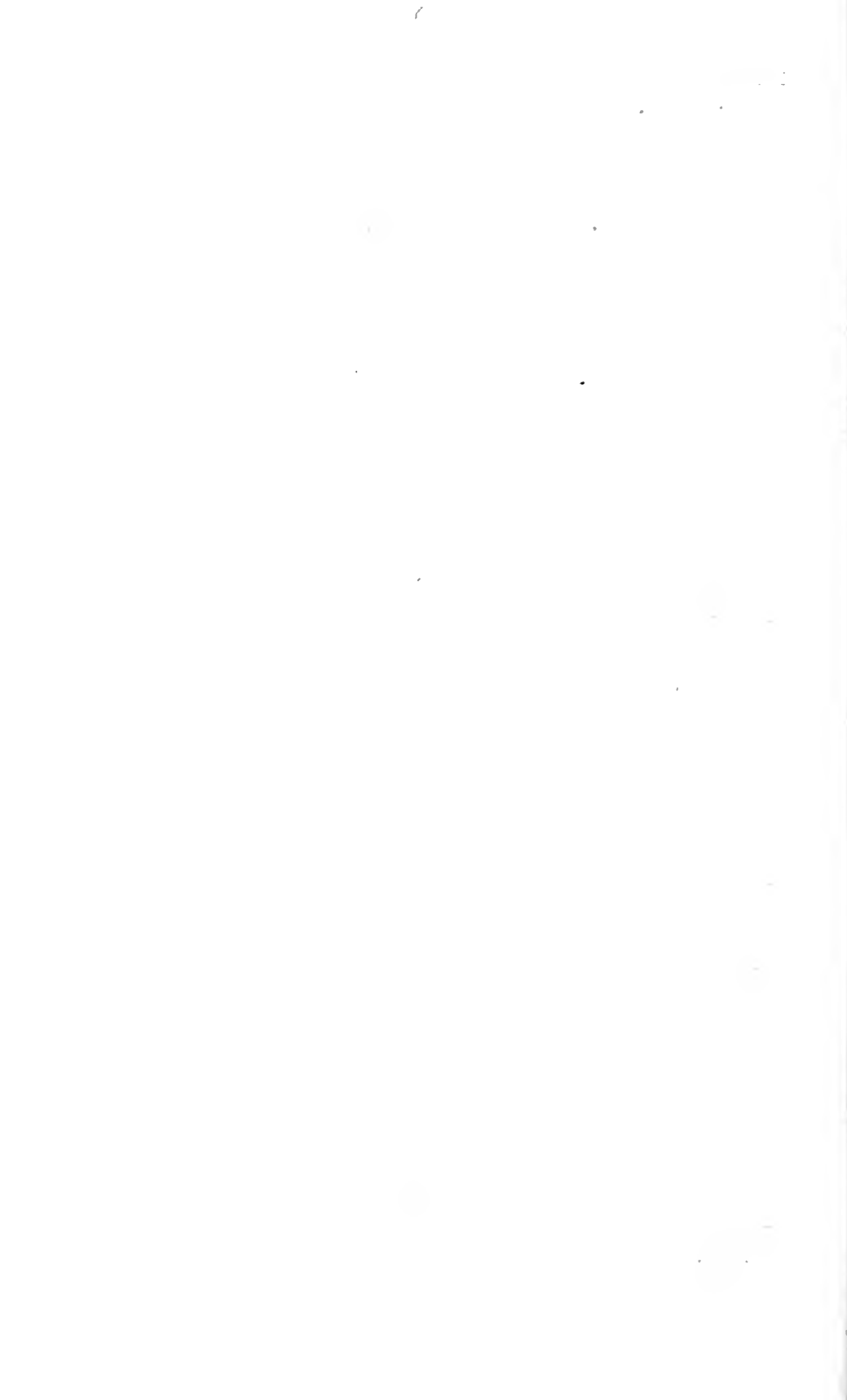
1891A.565

MR. JUSTICE JOSEPH B. GAGE  
DELIVERED THE OPINION OF THE COURT.

This is a suit instituted in the County Court by appellee against appellant to recover damages to appellee's delivery automobile occasioned by a collision with appellant's motor truck which is alleged to have been negligently operated by a servant of appellant. There is a verdict and judgment by last appellant for \$100.

The evidence bearing upon the negligence of appellee and the contributory negligence, if any, of appellee is directly conflicting.

Over the specific objection of appellant, evidence was called on behalf of appellee and permitted to testify to certain statements made by the servants of appellant from two to five minutes after the collision occurred, to the effect, in substance, that the brakes of the motor truck were out of order and they could not stop it; that they had seen the driver of appellee's automobile hold out his hand, as a signal that he was going to turn; that the motor truck was going at the rate of forty miles an hour. These allegations are merely assertions of negligence, of negligence and not a part of the res gestae. Isbell v. City of Chicago, 141 Ill. App., 180; Kelley v. Chicago City Ry. Co., 139 Ill., 334; Springfield Car. Ry. Co. v. Linsaney, 130 Ill., 9; Chicago N. T. Co. v. Daly, 140 Ill. App., 319.



The admission of this evidence was erroneous, and was necessarily prejudicial to appellant.

The proper measure of damages, if any, in this case is the cost of the repairs necessary to be made on appellee's automobile, and the reasonable value of the loss of the use of it while it is being repaired. Merry v. Campbell, 118 Ill. App., 618; Crosby v. C. & J. St. Ry. Co., 156 Ill. App., 43; Lotham v. C. C. C. & St. L. Ry. Co., 134 Ill. App., 559. Upon another trial the evidence should be confined within the rule as above stated.

The tenth instruction tendered by appellant and refused by the court was sufficiently covered by other given instructions. The eleventh instruction was stationary in its character, and the giving or refusing of the same was largely a matter within the discretion of the trial court.

For the error in the admission of incompetent evidence, the judgment is reversed and the case is remanded.

REVERSED AND REMANDED.



March Term, 1923, No.

100 - 10230.

1923

HARRY C. MOIR,

Defendant in Error.

vs.

AUSTIN F. HART,

Plaintiff in Error.

WHEEL CO.

OFFICIAL COURT

OF CHICAGO.

100 I.A. 566

DR. PRESIDING JUSTICE BAINE  
CLERK OF THE COURT.

Defendant in error instituted suit in the Municipal Court against plaintiff in error to recover damages for injuries to an automobile for alleged to have been occasioned by the negligence of plaintiff in error. There was a finding and judgment against plaintiff in error for \$100. There is no substantial conflict in the evidence bearing upon the material facts.

At about 8 o'clock in the evening of September 7, 1918, plaintiff in error was driving a ninety horse power touring car east on the south side of Madison street. He stopped his car on the west side of Clark street, and started to go east when the signal was given for the closure of east and west traffic across Clark street. The pavement on Madison street, consisting of concrete blocks, was smooth and was wet and slippery. As plaintiff in error crossed Clark street and proceeded east on Madison street, his car was running at a speed of from 5 to 6 miles an hour. At a point on Madison street about 150 feet east of Clark street a woman, who was crossing Madison street from south to north at that point, on foot, and who had reached a point upon or north of the south street car track, observed a car coming west, and in order to avoid the same, and without looking west, suddenly started back toward the south side of the



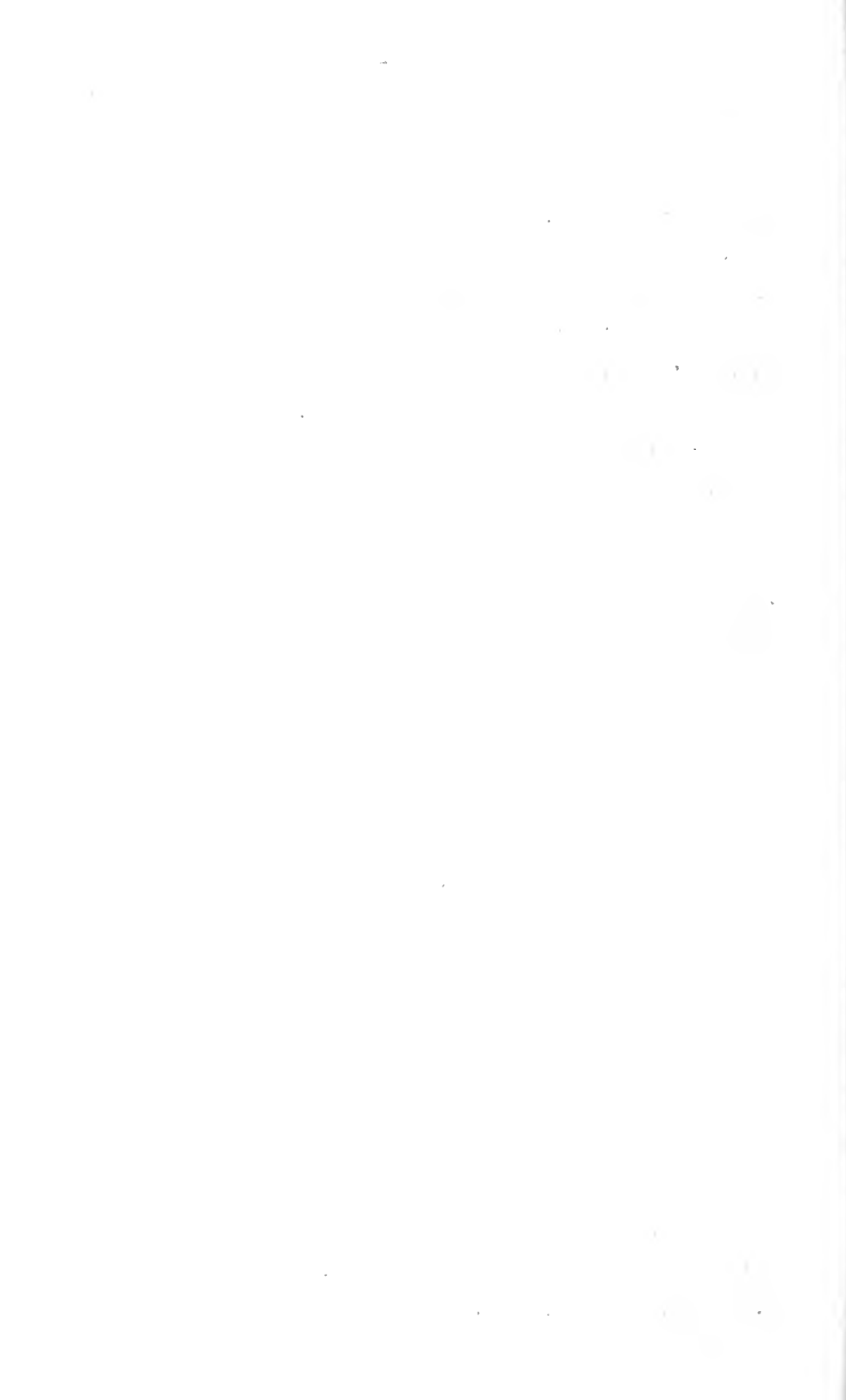
street, and almost directly in front of plaintiff in error's car. Immediately upon observing the oncoming of the woman, and to avoid injuring her, plaintiff in error applied the brakes upon his car. The necessarily sudden application of the brakes caused plaintiff in error's car to skid slightly to the south, so that a portion of the closed top of his car came in contact with a portion of the open top of defendant in error's car, which was then standing at the south curb, thereby causing the injury complained of.

That the car of plaintiff in error was then running slowly, and did not skid against the car of defendant in error with any terrificable force is evident from the fact that neither the bodies nor wheels of the cars came in contact, and from the further fact that although the woman was struck by the left front fender of plaintiff in error's car and fell upon the street pavement, she was uninjured.

Plaintiff in error was neither operating his car at an excessive rate of speed nor in a negligent manner, and the injury to the car of defendant in error resulted from an accident for which plaintiff in error can not be held liable to respond in damages.

While in the exercise of reasonable care for the safety of himself and others upon the street, he was suddenly and unexpectedly placed in a position which required him to act promptly by applying his brakes for the purpose of stopping his car, and the consequent skidding of his car upon a wet and slippery pavement was not, under the circumstances in which he was placed, avoidable by the exercise of reasonable care on his part.

His liability is the failure to bestow the care and skill which the situation demands. C. E. I. & P. Ry. Co. v. Hawley, 215 Ill., 505. And if one exercises the degree of care required of a reasonably prudent man under the cir-





circumstances, he is not negligent. Reynolds v. U. & A. Ry. Co., 255 I.L., 353.

The judgment is reversed with finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED  
WITH FINDING OF FACT.

FINDING OF FACT:

We find that the injury complained of was not occasioned by any negligence on the part of plaintiff in error.



MICHELIN TIRE COMPANY, a corporation, )  
Defendant in Error, )

vs.

ANTONIO SBARBARO and LEONARD A.  
SHADBURNE, copartners as the SIMPLEX  
AUTOMOBILE COMPANY, On Appeal of  
ANTONIO SBARBARO,  
Plaintiff in Error. )

ERROR TO

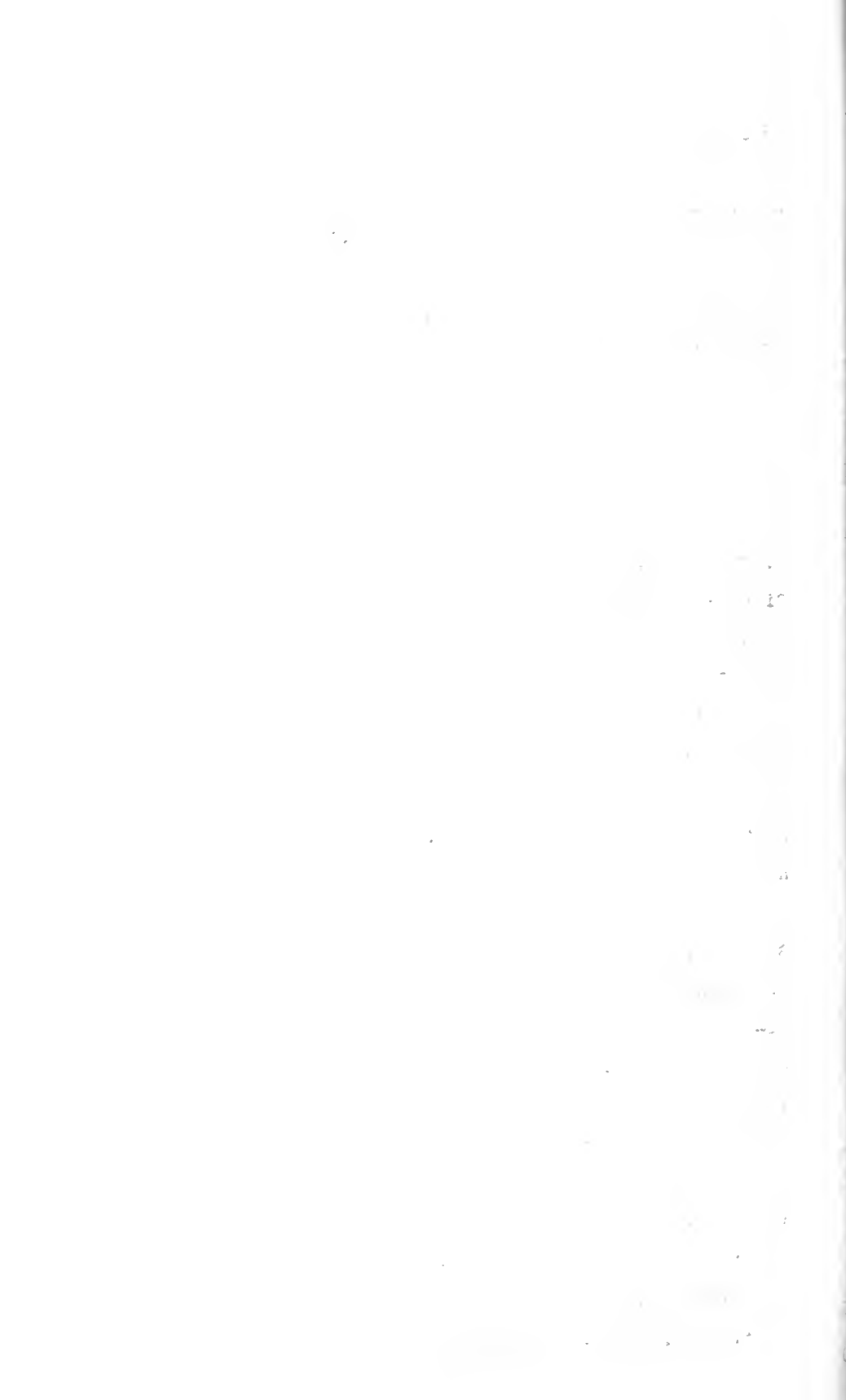
MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 585

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant in error sued Antonio Sbarbaro and Leonard A. Shadburne, as co-partners doing business in the name of Simplex Automobile Company, for goods, wares and merchandise sold and delivered at their special instance and request. Only Sbarbaro was served with process, who denied in his affidavit of defense the fact of the partnership alleged and denied that he purchased or authorized any one to purchase any goods whatever of defendant in error. The court gave judgment against Sbarbaro for \$312.60, the amount sued for, a jury having been waived.


The only question raised by plaintiff in error, Sbarbaro, against the finding and judgment of the court is as to whether or not he was proved to be a member of the alleged co-partnership when the goods were bought by a preponderance of the evidence. The evidence of Shadburne was positive that they were partners at that time. The evidence of Sbarbaro was equally positive that he never was such partner and had not bought or authorized any one to buy the goods of defendant in error. The credibility of the witnesses was a question for the court to settle, and he had the advantage of seeing the witnesses and of observing their conduct and demeanor while testifying, and his finding should have the same consideration

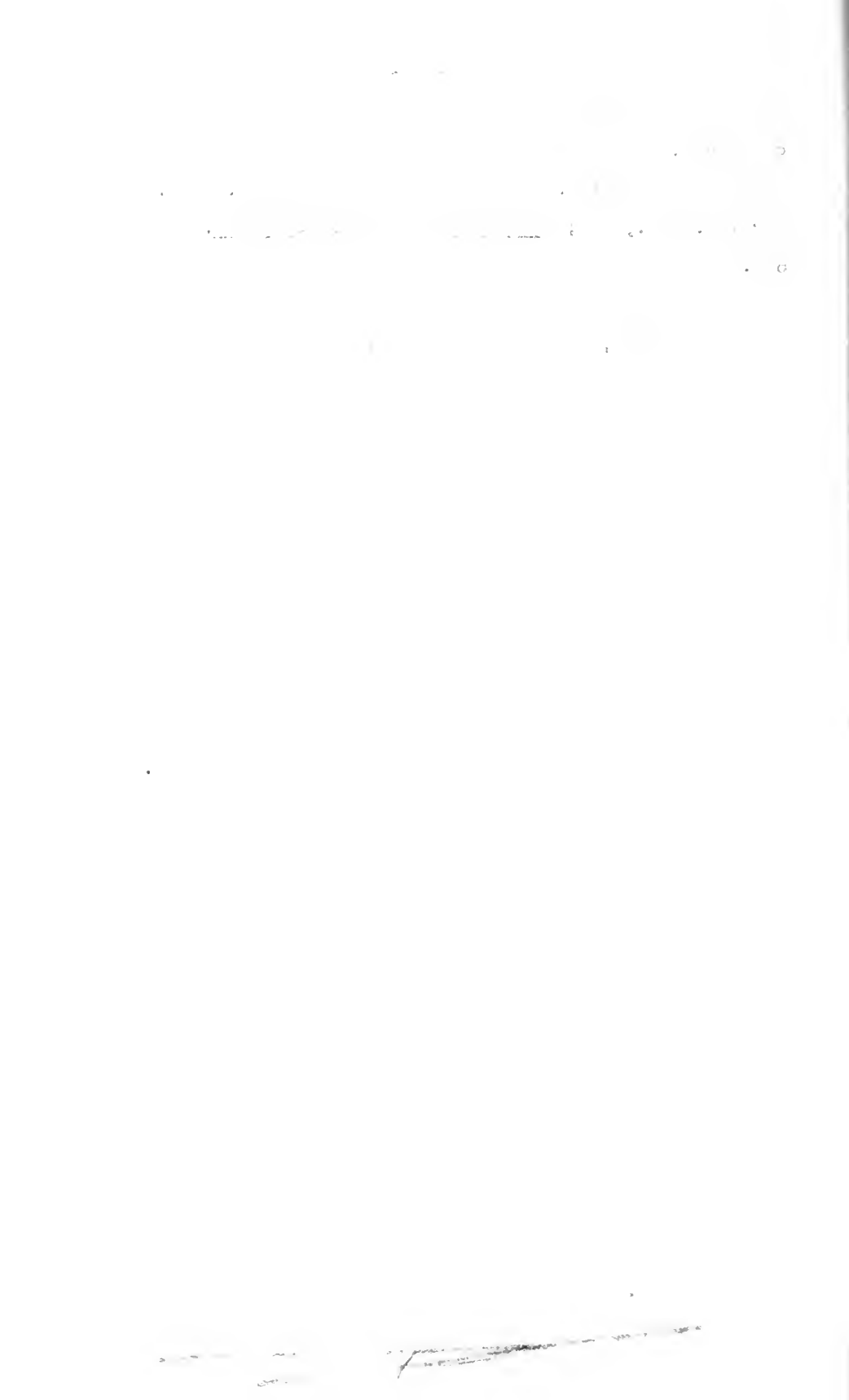


and the same force on a review by this court as the verdict of a jury. Unless manifestly against the weight of the evidence the judgment should be affirmed. Smith v. C. C. Ry. Co., 169 Ill. App., 570; Donelson v. E. St. L. Ry. Co., 335 Ill., 625.

The judgment is not manifestly against the weight of the evidence, and it is affirmed.

AFFIRMED.





CHARLES ROUTERS,  
Defendant in Error,

vs.

JAMES E. STAFFORD,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT  
OF CHICAGO.

189 I.A. 586

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover an alleged balance due defendant in error on eight bills for laundry, amounting to \$347.41, two bills for the year 1908, one for 1910, and five for 1912. A jury was waived and on the trial the court gave judgment for \$143.98.

The facts are that defendant in error, Charles Routers, who conducts a laundry business in Chicago, began in 1907 delivering laundry to one Mr. Jackson, the manager of the Commercial Hotel, owned by plaintiff in error, James E. Stafford, and continued to so deliver it, except during a few intervals of the time, until July 13, 1912. These deliveries were starched work for the guests of the hotel, and the managers of the hotel first daily collected the articles to be laundered from the hotel guests and delivered them to defendant in error's drivers, who in turn, as the laundry was made ready, delivered it to the managers to collect for the same and deliver it to the guests. At the end of each week the drivers would present their bill for the week for payment to the hotel manager, after first deducting the commission allowed the manager.

In 1908 one George Barnett was manager of the Commercial Hotel and was discharged by plaintiff in error for drunkenness. The Paris Laundry had for a short time been doing laundry work for the said guests, and in consideration





that he should remain this patronage defendant in error interceded for Mr. Barnett with plaintiff in error and obtained his reinstatement and the laundry work by agreeing to and signing on August 24, 1908, the following instrument:

"Mr. James W. Stafford,

Dear Sir:

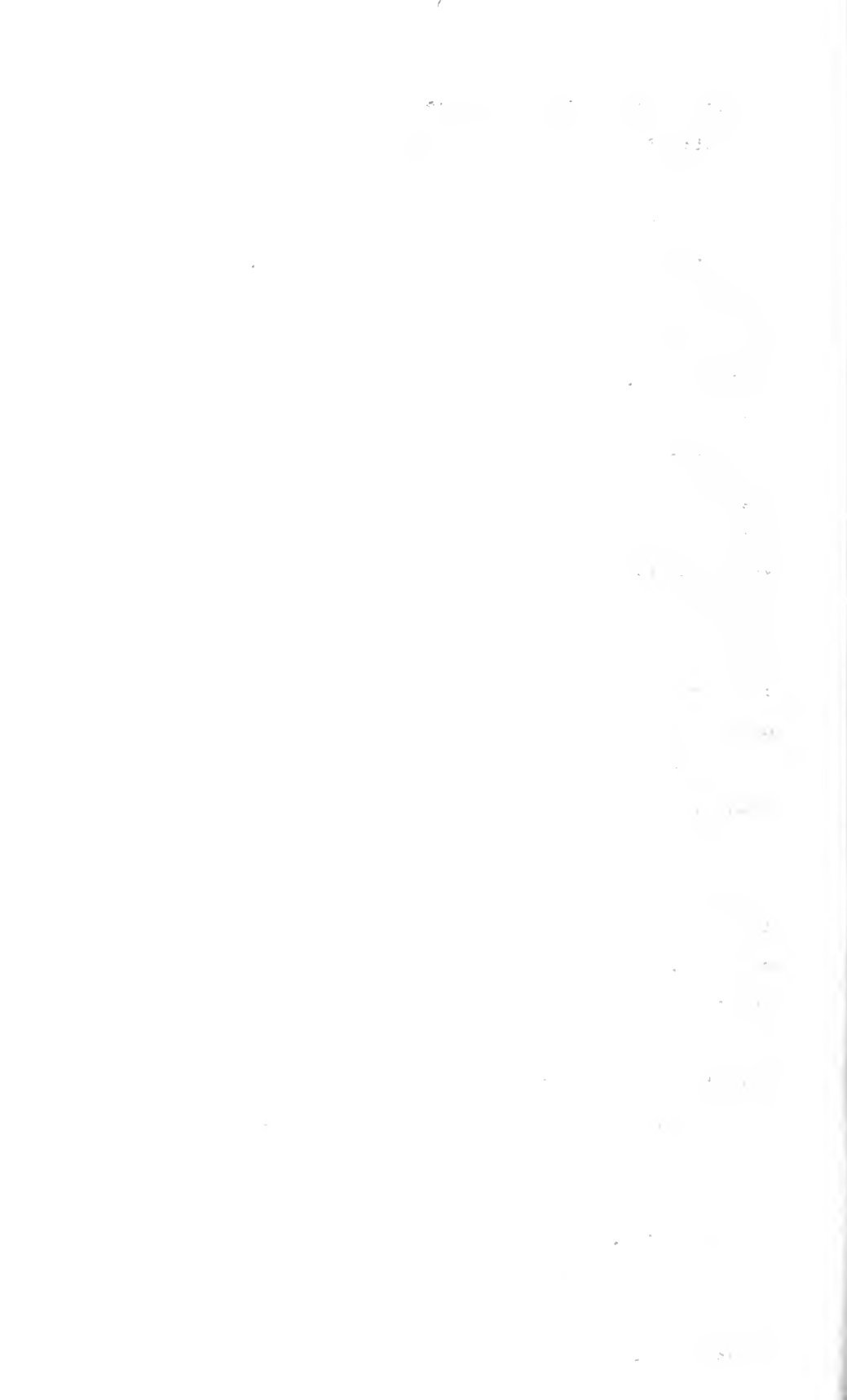
I will not hold you responsible for the laundry delivered to the Commercial Hotel as long as Mr. George Barnett will have charge of same."

It appears also that a similar contract was signed and delivered to Mr. Stafford at another time when Barnett got on a drunk, Mr. Stafford having required it as a condition to retaining Barnett as manager. Defendant in error fixes the date of this second contract which was lost as in 1908, while plaintiff in error and Barnett fixed it as of June 22, 1910. While manager of said hotel and agent as aforesaid of defendant in error, Barnett was to receive 30 per cent. on the bills charged the guests for laundry which netted him about sixty dollars per month, and he received as hotel manager twenty-five dollars per month and a hotel room free of charge from plaintiff in error. Mr. Stafford's personal laundry was done by defendant in error free of charge, but the hotel laundry was done by another laundry. Mr. Stafford had a room in the hotel, but did not personally look after the hotel or the laundry business, but knew his managers were transacting that business for defendant in error on a commission. The bills of defendant in error were also occasionally collected from the guests by other employees at said hotel for Mr. Barnett in his absence. The bills of laundry paid for were all for laundry delivered to said guests by Barnett as said manager, except the bills of July 6, 1910, for \$45.26, and of July 13, 1910, for \$46.27. Barnett was finally discharged, as said hotel manager on June 17, 1910, and on that day after his discharge a bill for \$51.85, for



laundry already distributed to the guests by Barnett, was presented for payment to the new manager by the driver of defendant in error who informed the driver that Barnett had gone with the money and that he must wait until the same could be gotten from Barnett. The bill of July 3, 1912, was presented to the new manager for the laundry of that week distributed to the guests, and both of said bills were also presented to Mr. Stafford, and the driver was again informed that Barnett was off on a drunk with the money. Mr. Stafford was afterwards informed that the sixty bundles for the week of July 13, 1912, would be held by defendant in error until all the bills were paid, and they were so held when the bill was presented and payment was refused. Plaintiff in error offered to pay the two July bills for laundry distributed to the guests under the new manager, if defendant in error would deliver the bundles withheld, but defendant in error would not deliver them unless all the bills were paid, and many of the guests left the hotel because they could not get their laundry.

The court gave judgment for the last three bills of laundry delivered June 29th and July 6th and 13th, and held that defendant in error was barred from a recovery by said releases, as to all the other bills. The instruments in question were clearly a bar to defendant in error's recovery for all laundry handled and distributed to the guests by Barnett while manager of the hotel. They were valid contracts of release based on valuable considerations. His right to recover is not in the least affected by the question of when the second instrument was executed, or whether or not it was ever executed. The first release under the evidence in this case was a complete bar to a recovery by defendant in error for all of said bills, except the bills delivered in July, 1912. While the bill of June 29, 1912, was on that day presented to



the new manager for payment, it was for laundry delivered in that week to the guests by Barnett before he left the hotel finally.

Plaintiff in error was not liable for the laundry bill of July 13, 1917, because the bundles were not delivered to the hotel or to the new manager for distribution. No such liability could attach until the bundles were delivered by defendant in error. Plaintiff in error offered to pay for the July bills, all that he was liable for, if defendant in error would deliver the bundles withheld. Defendant in error had a right to hold the sixty bundles for the payment of the laundry bill of July 13th, but not for any prior bills. The judgment of the court was right as to the bill of July 3, 1917, for \$45.36, as we think the conduct and dealings of the parties, as shown by the evidence, showed an implied agreement on the part of plaintiff in error to pay defendant in error for the said July bills when delivered. Plaintiff in error asked no release of such liability, but he cannot be held for the last bill until the bundles of laundry are delivered to him or to his manager.

The court was in error in rendering judgment for said last bill, and for the bill of June 29, 1917. The judgment is therefore reversed, and judgment is entered in this court in favor of defendant in error and against plaintiff in error for the sum of \$45.36 and for the costs in the lower court. A judgment for the costs in this court is entered in favor of plaintiff in error and against defendant in error.

The court finds as ultimate facts to be incorporated in this judgment, that defendant in error by a valid and binding contract released the plaintiff in error from all liability as to all bills for laundry delivered prior to July 3, 1917, and that the bill for July 13, 1917, was not due when this suit was brought.

JUDGMENT REVERSED WITH FINDING OF FACTS.



March Term, 1911, No.

92 - 12087.

ELIZABETH RYBARCZYK, Conservatrix of the)  
Estate of FRANK RYBARCZYK, Insane,  
Defendant in Error,

vs.

ANDREW RYBARCZYK,  
Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

189 I.A. 587

MR. JUSTICE DUNCAN-DELIVERED THE OPINION OF THE COURT.

Defendant in error, as conservatrix of Frank Rybarczyk, recovered a judgment in the sum of \$1,880 against Andrew Rybarczyk, plaintiff in error, in a trial before the court without a jury. In the statement of claim it is alleged that on June 23, 1910, Frank Rybarczyk was adjudged insane in the County Court of Cook County and that on June 28, 1910, Elizabeth Rybarczyk was appointed as conservatrix of his estate by said court, and that the claim sued for is for \$2,000 loaned by Frank Rybarczyk about June 1, 1910, while insane, to plaintiff in error, his brother; for \$300 collected by plaintiff in error on same date from his brother Frank's dairy business, after he had taken charge and control of the same and had operated same for a month or more; for \$300 for a check from F. Thoma & Co. payable to Frank Rybarczyk for a horse, and which plaintiff in error obtained from his said brother and cashed the same and appropriated to his own use the proceeds thereof about May 7, 1910; also for \$19.63 paid by Frank Rybarczyk about May 1, 1910, at the request of plaintiff in error for the taxes on certain real estate owned by the latter; and also for 5% interest on said amounts to date of judgment, April 14, 1910. Plaintiff in error in his affidavit of merits denied obtaining any money from his said brother by loan or otherwise, and denied that his brother paid any taxes for him on his property. Admitted that he

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took charge of his brother's dairy business, and that he obtained said check for \$500, but denied that he made any profits out of the dairy business, and averred that he cashed said check and paid at his brother's request the proceeds thereof to farmers who brought his brother milk.

We are asked to reverse this judgment upon three grounds, (1) that the testimony of Frank Rybarczyk was received without any proper proof being made as to his mental capacity to understand the nature of the proceedings, the solemnity of an oath, and his responsibility as a witness; (2) that in the examination of said witness by the Court the court in his questions to the witness assumed that plaintiff in error had obtained said moneys when up to that time the record contained no evidence thereof; (3) that the court erred in not granting a new trial to admit newly discovered evidence, as disclosed by affidavits filed. It is not claimed that the evidence does not support the judgment. The precise claim in that regard is that if the evidence of Frank Rybarczyk was excluded the judgment would not be supported by the evidence. We have read all the evidence in the record, for the reason that the purported abstract filed by plaintiff in error is so faulty and insufficient as not to give any correct conception of the evidence in the record. The evidence of Frank Rybarczyk is, in substance, that he had a certificate of deposit on the Krause bank for \$1,000, and that he and his brother Andrew went to the bank and had the certificate cashed and put the money in his safety deposit box at that bank; that he had \$2,085 in that safety box and that later he and his brother Andrew again went to that bank and that he took out all his money and that afterwards his brother Andrew got all of it, \$2,000 by borrowing it. Two other witnesses testified that on a day or two before Frank

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Rybarczyk was taken by his brother Andrew to Oshkosh, Wis., to be treated for alcoholic insanity, they saw Frank and Andrew riding together in Frank's buggy and that Frank was very drunk and excited and exhibited large rolls of money. About those same times Andrew deposited in his own bank to his own account \$400 and \$1,100, respectively on June 9, 1910, and June 10, 1910, the deposit of June 10th being larger than any deposit that he had made in over five years, as shown by the bank books. It was also proved that Frank received from his banker in December, 1909, a certificate of deposit for \$1,000 and that he cashed it on January 31, 1910, and that Andrew started with Frank to Oshkosh at about 9 P. M. of June 10th or 11th, 1910. It was also proved that Andrew paid out a large sum of money in February, 1911, for the purchase of a farm; that he obtained and cashed a check of \$300 payable to his brother Frank; that Frank paid taxes for Andrew on his land amounting to \$19.63; that Andrew took charge of Frank's dairy business and ran it from five to seven weeks, collected the moneys earned by the business without keeping any account of the same, and told Frank's wife a falsehood concerning it by saying to her that he had bought the business of Frank; and that all said transactions happened in the spring and just before Frank was adjudged insane. In fine Frank Rybarczyk's testimony is well corroborated or supported by the other evidence in the case.

Andrew Rybarczyk admitted getting the \$300 check, but testified that he cashed it and paid it out at Frank's request to three farmers for milk, all of whom were sworn and contradicted him. He also undertook to show where he got the \$1,100 deposited in his account on June 10, 1910, by testifying that he collected \$300 of it from Bernard Maciejewski of Chicago on the evening of June 9, 1910, and produced Maciejewski as a witness and his receipt of that date showing



that that sum was then so paid to Andrew in cash money at Maciejewski's house for cement side walks and a house foundation built by Andrew for Maciejewski in Chicago in May and June, 1910. Their evidence was overwhelmed with abundant and convincing proof showing that two pieces of the work were done in 1906, and the rest of it after June, 1910, the proof being evidence of witnesses, building permits by the city and Andrew's own private stamp in the cement walks showing the years in which the work was done, such stamps and permits being required by the ordinance of the city. Plaintiff in error was contradicted in many ways by about all the witnesses who testified, including himself, and as the evidence supports the judgment, we think it should be affirmed, in case Frank Rybarczyk's evidence was properly admitted, and we hold that it was.

Frank Rybarczyk, as shown by this record, was an habitual drunkard and very much incapacitated by his drunkenness from transacting business prior to his being adjudged insane and sent to Oshkosh about June 11 or 12, 1910. At the time he testified in this case he was living at home with his wife and family, and apparently had been discharged from the hospital for insane to which he was sent. He is a foreigner by birth and speaks very broken English. We have examined his evidence in the record thoroughly and we think he testified intelligently and that he had a fairly good capacity of observation and of communication, and understood the character and nature of the oath he took. The standard of intelligence that witnesses should be gauged by, as well as all other questions of competency of that nature, are matters left to the trial court's discretion, where not otherwise specifically provided by statute. Evidence that the mind of a witness is not so far enfeebled as to prevent an intelligent appreciation of his responsibility as a witness

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and a fair recollection and understanding of the matters about which he testifies, will sustain the admission of his testimony, although the record may show that a conservator had been previously appointed on the ground that he was of feeble mind, not capable of transacting business, where it is not shown that his mental impairment was permanent.

Tucker v. Shaw, 158 Ill., 326. See also Wigmore on Evidence, Secs. 492 to 499 inclusive.

The court examined the witness in question to some extent on his ability to understand and to appreciate the nature and responsibility of an oath, and if plaintiff in error was not satisfied with the examination he should have insisted on a more thorough examination. The fact that the witness was sent home from the institution to which he was entrusted for treatment is also to be taken as evidence that he had improved mentally.

The record in this case shows that a bill of exceptions was signed by the trial judge and filed as a part of the record. It does not appear that there was any objection whatever made by plaintiff in error to the testimony of Frank Rybarczyk, and that not a single question was asked him by plaintiff in error. No motion for a new trial or exceptions to the overruling of the same appears in the bill of exceptions, nor any exception to the judgment. The affidavits in support of a new trial are not made a part of the bill of exceptions, but they, with the motion for a new trial, are simply attached to the common law record, and are not in any way certified by the judge as a part of the record or bill of exceptions. Plaintiff in error is, therefore, in no position to question this judgment for insufficiency of evidence, or upon any other grounds urged by him in this court. Blake v. DeJonghe, Hotel Co., 263 Ill., 471; Peyton v. Village of Morgan Park, 172 Ill., 102; E. C. St. Ry. Co. v. People, 155 Ill., 299.





Section 81 of our Practice Act prescribes two distinct co-ordinate methods of having the rulings of a trial court preserved and reviewed, one by stenographic report of the trial containing the evidence and the rulings of the court upon questions submitted to and ruled on by the trial judge, and the other by a bill of exceptions, as provided previous to the amendment to said section in 1911. If the method by bill of exceptions is employed the former rules of law in regard thereto govern, except where specifically changed by the 1911 amendment. Maak v. C. Rys. Co., 183 Ill. App., 266.

No rulings of the court are preserved or shown by this record by either method above mentioned and even though it be not necessary now to except to the judgment when a stenographic report is filed in order to review the evidence, the court never was asked to pass on the competency of the evidence complained of, and hence there is no occasion for complaint in this court as to the matters of which complaint is made by plaintiff in error.

The record shows Frank Rybarczyk was sworn, and hence the complaint on that score is without good ground, as the record cannot be contradicted.

The newly discovered evidence, so called, as disclosed by the affidavit, <sup>is</sup> ~~are~~ simply forgotten evidence, and <sup>is</sup> ~~are~~, in substance, a showing that plaintiff in error remembered after the trial, aided by the diligence of his attorney, that he got the \$1,100 deposited by him June 10, 1912, of other parties, and not of Maciejewski, as he swore on the trial. No proper diligence was shown in securing the forgotten evidence, and it was merely cumulative. No reason was shown why the court should favorably consider his efforts at obtaining further evidence on that line.

The judgment of the court is affirmed.

AFFIRMED.



104 - 19100.

J. B. MADSEN & COMPANY,

Plaintiff in Error,

vs.

HENRY HOGANS,

Defendant in Error.

ERROR TO

COUNTY COURT,

COOK COUNTY.

109 I.A. 589

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

J. B. Madsen & Company, plaintiff in error, sued defendant in error for an alleged balance due of \$519.30 on certain contracts for store fixtures and extras. The declaration was the common counts in assumpsit to which the general issue was pleaded with a stipulation by the parties that all proper pleadings should be deemed as having been filed, and the proper issues formed thereon to enable both of them to properly present their respective claims in the cause. A jury was waived and the court at the conclusion of the trial entered judgment against the plaintiff in error.

The evidence disclosed that plaintiff in error was a manufacturer of store fixtures, such as shelves, drawers, counters, show cases, prescription cases, telephone booths, tracks and ladders, wall cases, desks, etc.; and that defendant in error was the owner of a newly constructed building in Oak Park, Chicago, occupied in part by two tenants, Otto Kasch, a druggist, and Henry Klebo, a dry goods merchant, with each of whom defendant in error had agreed to purchase and install in said building their store fixtures in consideration that they would afterwards repay to him the purchase price of such fixtures. Accordingly, defendant in error entered into a contract with plaintiff in error for the drug store fixtures on August 19, 1910, wherein plaintiff in error agreed to make said fixtures for the sum of \$1,700, \$400 thereof to be paid cash, \$1,000 when set up complete,

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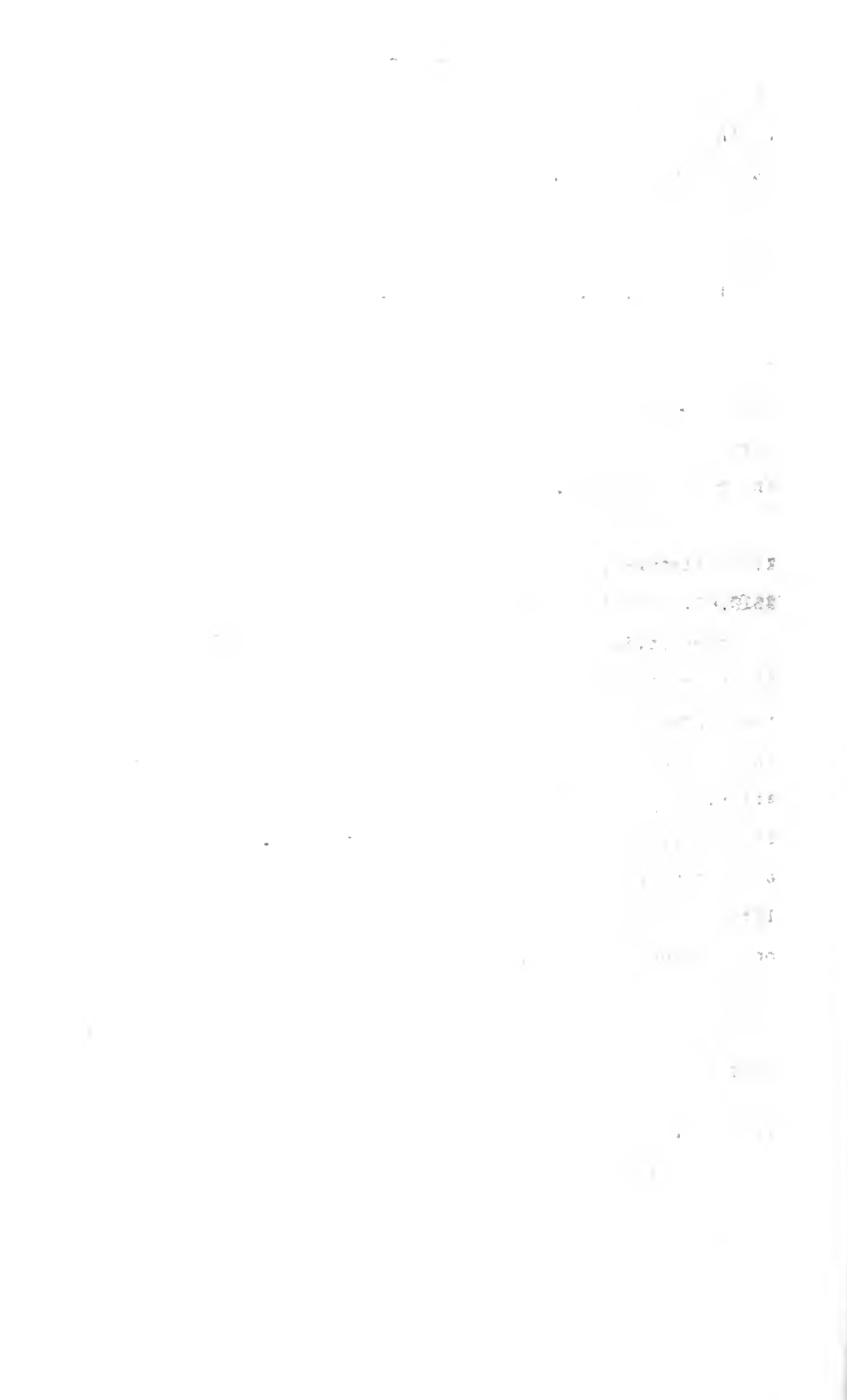
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and \$300 thirty days later. There were specifications naming the fixtures and their material, and specifying how they were to be made and finished, which were attached to the contract in the usual way; and both the contract and the specifications were to be and were approved by Kasch endorsing them, "O. K., Otto Kasch". Defendant in error paid \$400 on the Kasch fixtures, August 22, 1910, and \$1,000 October 26, 1910; and plaintiff in error claimed a balance due thereon of \$339.32, including \$39.32 as an extra charge for a large glass that was broken in one of the show cases and replaced by it.

He also entered into a written contract for the Klebo fixtures, September 3, 1910, for which he was to pay \$619.00, \$200 thereof cash and the remainder when the job was completed. Specifications for that job were also attached to the contract, and on September 12, 1910, \$219 was paid on the contract by defendant in Error, and on October 18, 1910, the remainder thereof was paid as contended by plaintiff in error, and, therefore, no part of this contract was sued on in the first instance by plaintiff in error. Defendant in error contended on his part that the \$400 paid by him October 18th was paid on the general account between them, and not on the Klebo contract, and this contention finally became a part of the suit under a protest of plaintiff in error that it was a distinct matter having no connection with the matters sued for by it, and a contract already paid for by defendant in error.

The third item in suit is for \$54.00 as an extra for covering a naked iron beam in the drug store. On this item two witnesses for plaintiff in error testified that defendant in error was to pay for that job extra, while two witnesses for defendant in error, including himself, testified



that no extra charge was to be made for that work, and that it was to be done gratis in consideration that defendant in error had employed plaintiff in error to do quite an amount of work. Defendant in error insisted and testified that that work was included as a part of the original Kasch contract.

The fourth item in the suit was for \$126 for six china closets or side boards, three at \$18 each, and three at \$34 each. It was admitted by defendant in error that the work for these china closets was an extra or different contract from the other jobs. The only defense made to that charge was that when first delivered they were very unsatisfactory to defendant in error; and that plaintiff in error took them back again to do the work over and that afterwards only five of them were delivered to defendant in error, one of the \$34 closets being retained. Plaintiff in error's foreman positively testified that he delivered all six of them while defendant in error testified he only received the five. As to \$102 of that claim the record shows no defense, and as to the remaining sideboard, it was and is a question of fact to be settled by the trial court, as to whether or not it was delivered. The same is also true as to the claim for \$39.32 for the broken glass, as two witnesses swear positively for plaintiff in error that it was broken after it was put in and by employees of Kasch and that defendant in error agreed to pay extra for the same, while two for defendant in error testified that it was broken by the man who put it in and that plaintiff in error agreed to replace it without charge. It was also a question of fact whether the \$400 of October 18th was paid on general account or on the Klebo job, and we would not feel warranted in setting aside a finding on any of these questions of fact as manifestly against the weight of the evidence.

It further appeared from the evidence that all of





the foregoing items of charge for said contracts, and the said payments thereon were in the form of a general account against defendant in error, and were contained on a single page of the books of plaintiff in error, as charges and credits in the account without any designation therein as to what they were for or to what they pertained, except that the charges and credits bore the dates when made, and the items charged for were referred to as "merchandise". Plaintiff in error, therefore, was proven to have been suing on an account the credit items of which were not designated further than their dates and amounts, and only the oral evidence disclosed the application that should be made as to each payment. Plaintiff in error was, therefore, properly held by the court to be suing on an account, and it could not legally split its cause of action to the prejudice of defendant in error. Nickerson v. Rockwell, 90 Ill., 430.

Defendant in error by his proof in the record seems to have relied on plea of recoupment as to the Kasch and Klebo contracts. The court properly held the law to be that defendant in error could not set off or recoup damages to defendant in error in one of those contracts against what might be due plaintiff in error on the other contract, or on any other item sued for in the suit. The law of recoupment is that unliquidated damages growing out of a contract, can only be recouped or set off in the particular contract in which the damages are claimed, and can not be a matter of set-off or recoupment to any amount owed on another distinct contract or claim, and no judgment can be given for any excess the claim for recoupment might show over the amount due on the particular contract to which recoupment is pleaded. So if the Klebo contract was paid in full by defendant in error, as claimed by plaintiff in error no recoupment or set-off should be allowed in this case for any supposed damages to defendant in error by reason of any failure of plaintiff in



error to perform the Klebo contract. If on the other hand the court should find that only \$219 was paid on the Klebo contract, the court should then after allowing recoupment in each case, if found proper, find the amounts, if any, due respectively on the Kasch and Klebo contracts separately, and also the amounts due on every other item of the account, if any, separately, and if the sums of all those items should not exceed the \$400 paid on general account by defendant in error, then judgment should be for the defendant in error.

In the Kasch contract both parties conceded that the contract was to be paid for if Kasch received the fixtures and directed defendant in error to pay for them in an order stating that they were completed according to contract. On December 8, 1910, Kasch signed such an order and statement, but he testified positively that the said order was not dated, and that plaintiff in error agreed when he got it that the fixtures were not completed, and that he would not present the order until he did complete them, and that after he had completed the fixtures he would date the order of that date, and present it to defendant in error for the balance of his money, and that he wanted the order then to prevent any other trip to secure it. Plaintiff in error's foreman who got this order denied that statement and testified that the fixtures were completed when he got the order, and that Kasch said he was well pleased with them, and signed said order and statement without any conditions or requests whatever for further work on the fixtures. Upon the truth of that statement that \$300 balance properly depends. If the court should believe that testimony of Kasch, judgment as to that item should be for defendant in error, but otherwise it should be for plaintiff in error, because no further work was ever done on the fixtures to complete them. It is true that the duplicate contracts held by the parties in the Kasch

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contract differ as to the finish that the fixtures were to have, plaintiff in error's copy specifying that the finish was to be like the fixtures ~~at~~ ~~those~~ at the Merz Drug Store, corner 42nd and Madison streets, while the other specified that the finish should be like that of a fountain made for Kasch by the Liquid Carbonic Company. If Kasch approved the fixtures as completed according to contract and signed said order, there can be no further complaint from defendant in error, except for latent defects not then discovered, and there is no evidence of any latent defects.

As to the Klebo fixtures, Klebo testified that they were not made according to contract and that when they were delivered he so informed Bank's, foreman of defendant in error; and there is other evidence in the record tending to show that plaintiff in error did not use good workmanship in making them. Defendant in error refused to pay for them because not accepted by Klebo and not made according to the contract. Klebo now has them and is still using them. All the defects were apparent on inspection and defendant in error should be required to pay for them less any damages for failure to make them according to the contract. Klebo had a right to return the fixtures if not made according to contract, if he had chosen to do so, but he cannot retain them without paying for them, less the proper damages, if any. The measure of damages in such case is the difference in the cash value of the articles as delivered, and their cash value when completed according to contract. These rules should govern only in case the court or jury should find that defendant in error had only paid \$312 on the Klebo fixtures.

The Klebo and Kasch contracts were executory contracts for the manufacture and sale of said fixtures. Such contracts by a manufacturer carry with them implied obligations that the articles should be made of sound material, of

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the system has solutions for all values of the parameters  $\alpha$  and  $\beta$  if the function  $f(x)$  is continuous and has a bounded derivative. The second part of the paper is devoted to a detailed study of the properties of the solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the solutions of the system of equations (1) are unique and depend continuously on the parameters  $\alpha$  and  $\beta$ . The third part of the paper is devoted to a study of the asymptotic properties of the solutions of the system of equations (1) for arbitrary values of the parameters  $\alpha$  and  $\beta$ . It is shown that the solutions of the system of equations (1) approach zero as  $x \rightarrow \infty$  for all values of the parameters  $\alpha$  and  $\beta$ .

1. Introduction

2. General discussion

3. Detailed study of the properties of the solutions

4. Asymptotic properties of the solutions

5. Conclusion

6. References

7. Appendix

8. Bibliography

9. Index

10. Summary

11. Acknowledgments

12. Author's address

13. Date of receipt of manuscript

14. Date of acceptance for publication

15. Date of publication

16. Date of printing

17. Date of distribution

18. Date of circulation

19. Date of sale

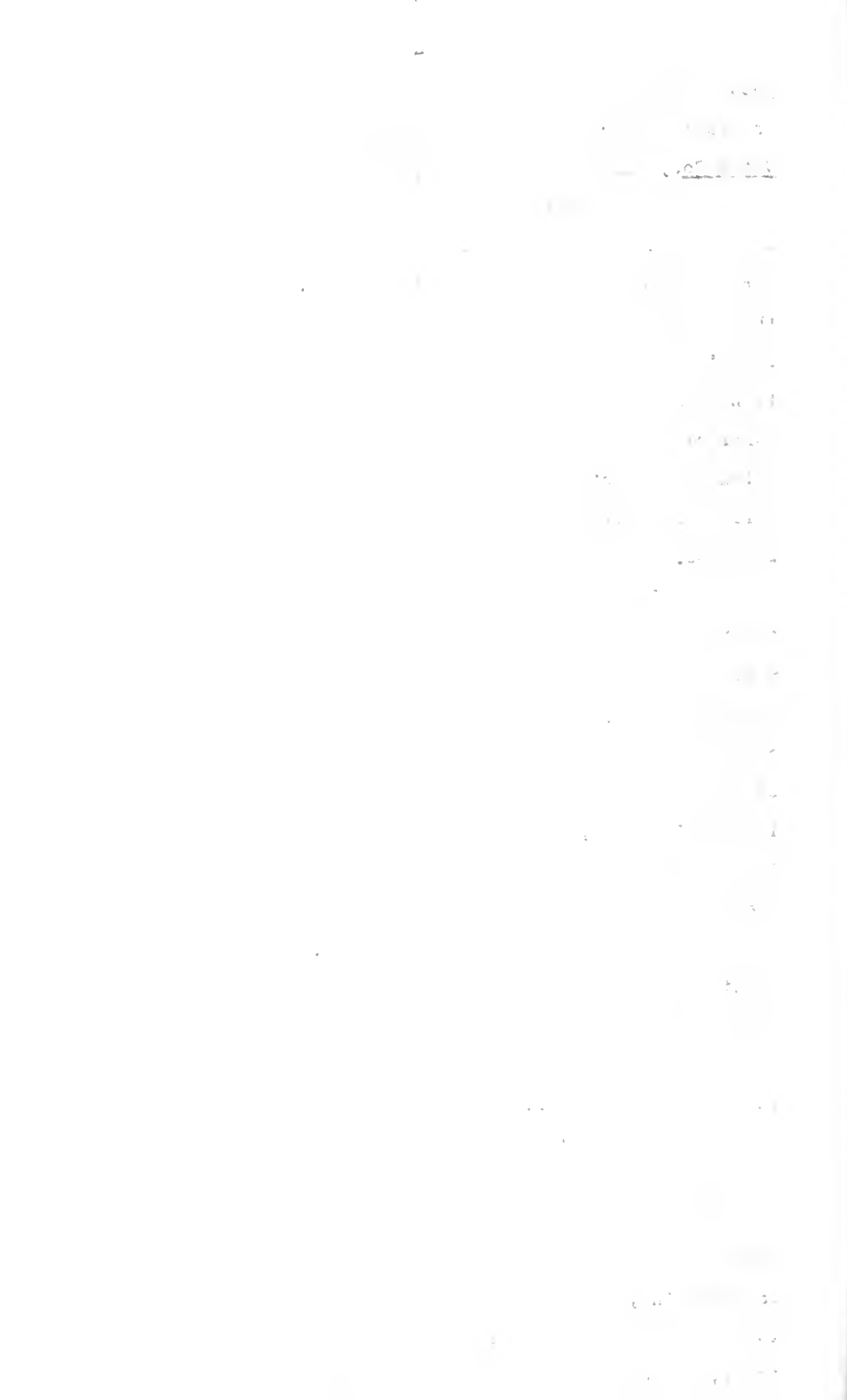
20. Date of purchase

good workmanship, and that they shall be manufactured according to the specifications. U. S. Aluminus Co. v. Ames Motor Co., 183 Ill. App., 194, and cases there cited.

The written contract and specifications, however, must govern and no oral evidence is admissible to change the terms of the contract and specifications. It was error in the court to permit the defendant in error over plaintiff in error's objections to testify that the work for covering the iron beam was a part of the Kasch contract. The written contract did not so provide, and there was no new consideration to support the claim if made that plaintiff in error agreed to cover the iron beam gratis after the Kasch contract was made.

The court also erred in receiving oral testimony to the effect that plaintiff in error agreed that he would make the 8 feet floor case in the Klebo contract "just like the Bodak case, and as good if not better". The written contract did not so provide. It specifies that the finish of the Klebo fixtures should be golden to match the fixtures in Klebo's store, and all exposed parts to be of plain oak. The meaning of those terms is plain and they cannot be interpreted as a contract to build the fixtures exactly like and as good as the Bodak fixtures mentioned. The written contract only bound plaintiff in error to use sound material of the character therein mentioned, and to make and finish them according to the specifications named, using good workmanship in their construction.

The court also permitted improper evidence as to the measure of damages as to the Klebo fixtures, as already indicated, the evidence received being as to how much it would cost to make the fixtures according to contract. We do not think, however, that defendant in error was estopped to complain of the fixtures not being made according to contract, because of Kasch and Klebo signing cards acknowledging





receipt of the various articles named, "in good order", nor by the signing of the time cards of the workman stating that their work was satisfactory. These receipts were given at times when the fixtures were only partly finished and in many instances the receipts were for the material, and at no time for the completed finished fixtures in place.

We can not definitely determine from the record how the court arrived at its judgment. We must conclude, however, that it considered the erroneous evidence above referred to in deciding the case, as plaintiff in error objected to it when offered, and moved to exclude it at the close of the case, and the court positively overruled the objections and denied the motion. The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.



SANFORD B. SCIDMORE,  
Plaintiff in Error,  
vs.  
F. A. HILL, etc., et al.,  
Defendants.  
A. H. OLSON,  
Defendant in Error.

ERROR TO  
MUNICIPAL COURT  
OF CHICAGO.

1891A.592

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

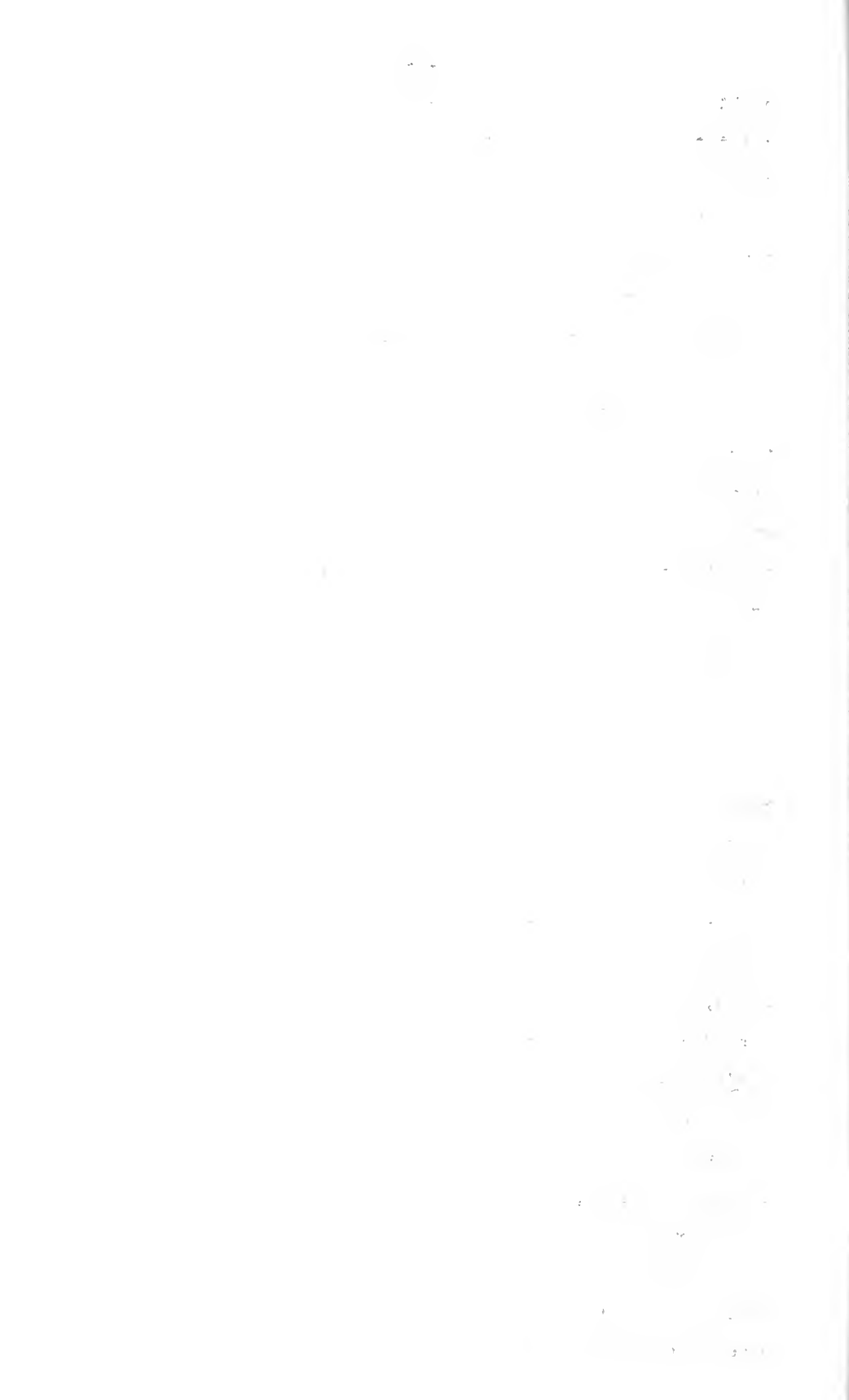
Sanford B. Scidmore, plaintiff in error, vs. A. H. Olson, defendant in error, and F. A. Hill & Co. for \$200 as liquidated damages. By agreement the suit was dismissed as to F. A. Hill & Co., leaving the suit pending against Olson for \$100. A jury was waived and the cause was tried on a written stipulation of facts and the court gave judgment in favor of defendant in error.

The suit grew out of a contract signed by Olson and Scidmore, May 10, 1912, for the sale and purchase of a certain lot of real estate, in which Scidmore agreed to sell, and Olson to buy, the lot at the price of \$7,150, of which \$200 was paid in cash as earnest money and to be applied on the purchase when consummated, and \$6,950 thereof was to be paid at the office of F. A. Hill & Co., Chicago, within five days after the title had been examined and found good, provided a good and sufficient general warranty deed, conveying a good title to the premises should then be ready for delivery. A complete abstract of title or merchantable copy was to be furnished within a reasonable time, with a continuation thereof brought down to date. In case the title, upon examination, was found materially defective within ten days after the abstract was furnished, then, unless the material defects were cured within sixty days after written notice thereof, the earnest money was to be refunded and the contract became inoperative. If Olson failed to perform the contract promptly



on his part at the time and in the manner specified, the earnest money, at the option of Seidmore, was to be forfeited as liquidated damages including commissions payable by Seidmore, and the contract was to become null and void. It also expressly provided that time is of the essence of the contract and all the conditions thereof, and that the contract and earnest money should be held by F. A. Hill & Co. for the mutual benefit of the parties thereto.

The facts stipulated are that about two months prior to said contract, Olson called on Seidmore to purchase said premises, and refused to buy them on the advice of his attorney because of certain building restrictions contained in the deed of Seidmore's grantor, Florence E. Patrick; that when said written contract was signed F. A. Hill & Co. promised Olson to have the building restrictions removed; that afterwards an abstract of title was furnished Olson which he retained and did not within ten days state any objections thereto in writing or otherwise; that about thirty days after said contract was made Seidmore tendered Olson a general warranty deed to said premises, in which no restrictions were mentioned, and Olson refused to accept the deed and pay for the lot unless said restrictions were removed; that the restrictions mentioned are that the grantees in said deed mentioned, their heirs, executors, administrators or assigns should not for a period of twenty years erect on said lot a wall of any building <sup>within</sup> ~~ing~~ forty-eight feet of the front side wall line of said lot, nor within three feet of the north line thereof, and should not build or cause to be built within twenty years any building or structure, except a single private dwelling house or a flat building not to exceed two stories in height, except a stable or garage on the southeast corner, without the written consent of the grantor; that any flat so built should have a stone or pressed brick front and the side walls be of



pressed or sand brick, and that the rear driveway should be enclosed on the north side. It was further stipulated that the brother-in-law of Florence E. Patriot owned the property adjoining said lot, and that Olson was ready, willing and able to carry out his said contract if said restrictions should be removed, and that E. A. Hill & Co. paid him back one hundred dollars of the earnest money.

It is argued by defendant in error that plaintiff in error waived any written notice of objections to the title as to said building restrictions, because E. A. Hill & Co., agents of plaintiff in error, agreed when the written contract was signed to have the restrictions removed. There is no evidence in the record by stipulation or otherwise that Hill & Co. were the agents of plaintiff in error, or that they were authorized by plaintiff in error to make such promise. The mere fact that defendant in error had previously objected to the title by reason of said restrictions would not relieve defendant in error of giving notice of the same defects or objections to the title, if he intended to rely on them, and within ten days after the abstract was furnished to him, as provided by his written contract. The written contract was binding on both parties and time was thereby made of the essence of the contract. The contract plainly and positively provides, in substance, that in case the objections are not made promptly and within the ten days after the abstract was furnished that the earnest money paid shall at the option of plaintiff in error be forfeited as liquidated damages and the contract be null and void, unless within five days after deed tendered, as agreed, defendant in error should accept the same and pay the remainder of the purchase money. All objections were waived after the ten days given in which to make them, and no other reasonable construction can be made of the contract.





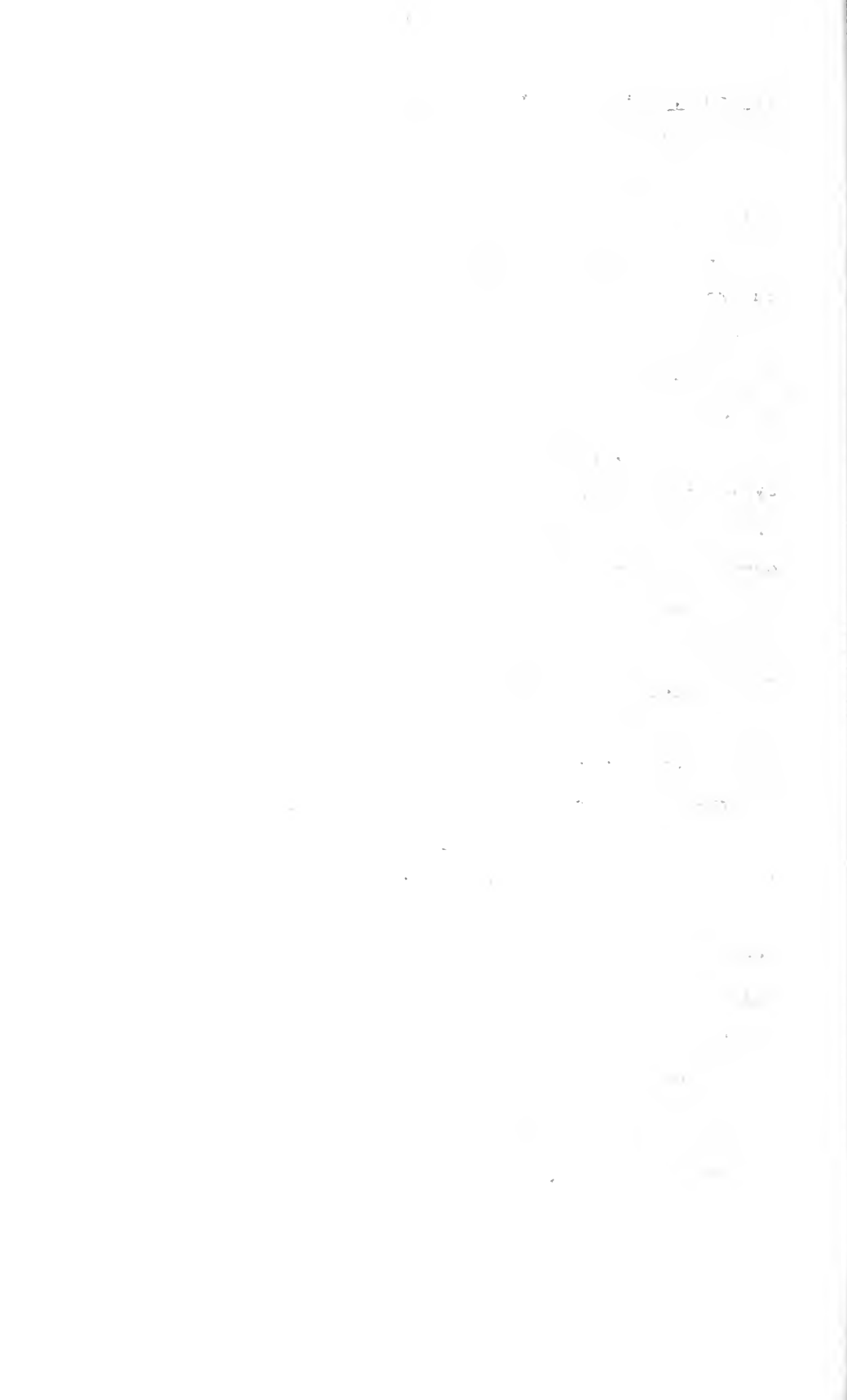
Watson v. White, 152 Ill., 364, where the same character of a contract was construed.

Defendant in error and plaintiff in error could waive any of the provisions of the contract they desired to waive. If it had appeared from the evidence that plaintiff in error by himself or by his duly authorized agent had after signing the written contract agreed to remove the building restrictions in question that would be evidence of a waiver of any further written objections on that score. The agreement, however, is not shown to be by plaintiff in error but by a third party. Plaintiff in error not having waived the provisions of the contract was entitled to recover the earnest money in accordance with the contract, after declaring the forfeiture, although the building restrictions were material defects in the title. Christman v. Miller, 31 Ill., 327; Dikeman v. Sunday Creek Coal Co., 184 Ill., 546.

The judgment is reversed and judgment is entered in this court in favor of plaintiff in error and against defendant in error in the sum of \$100 and for costs.

We find as ultimate facts to be incorporated in the judgment of this court, that defendant in error failed to make any objections to the title to the lot, written or oral, within ten days after abstract of title was furnished him, and thereafter failed to accept the deed and pay for same within five days after a proper warranty deed to the premises was tendered to him and that defendant in error declared the earnest money forfeited and demanded payment of the same before suit brought.

JUDGMENT REVERSED.



90 - 19082.

19082

THE PEOPLE OF THE STATE OF ILLINOIS,  
for use of CHARLES E. TITLEY,  
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY  
COMPANY,  
Defendant in Error.

ERROR TO

CIRCUIT COURT,

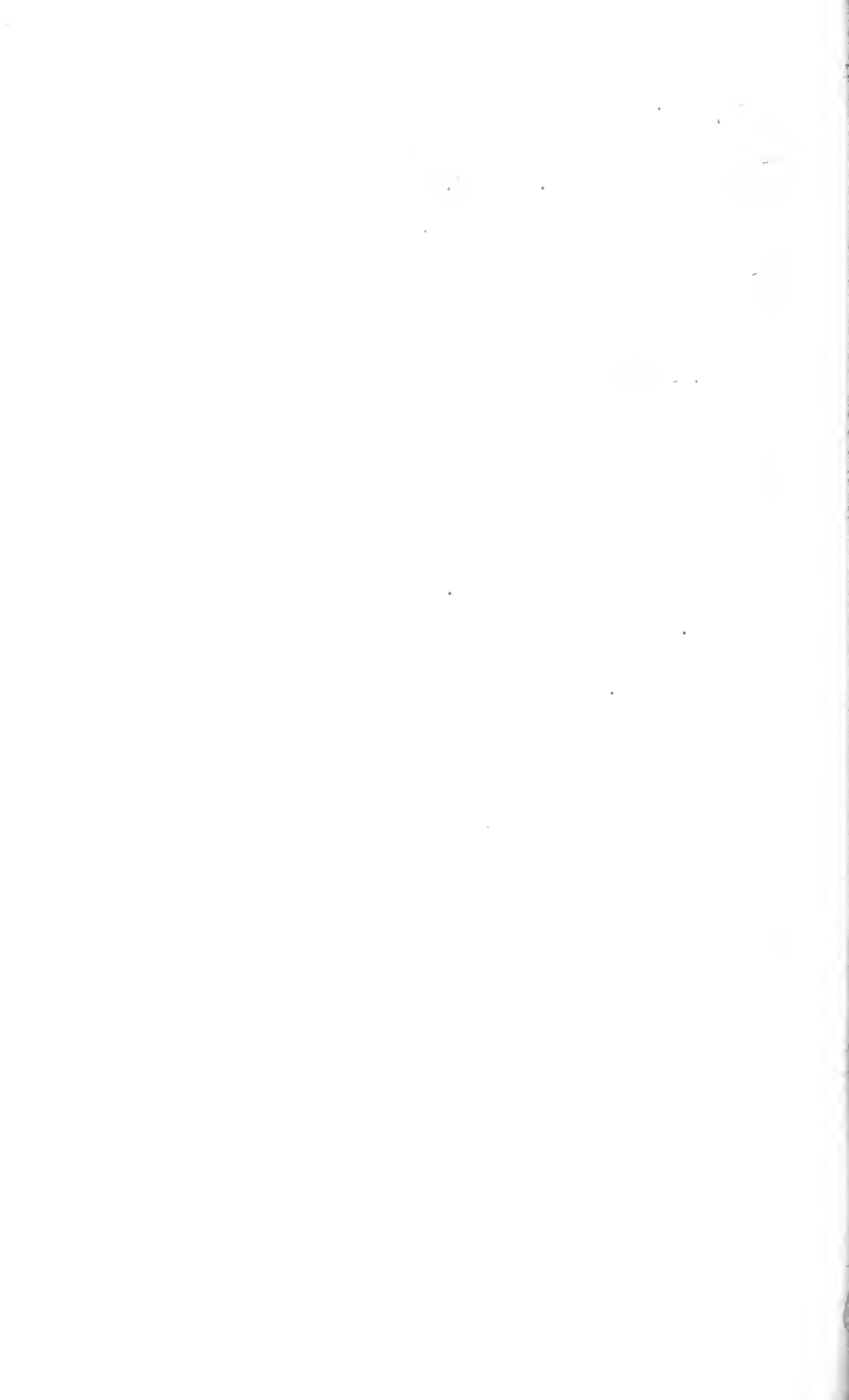
COOK COUNTY.

189 I.A. 593

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error began suit in the Circuit Court of Cook County against the surety on a receiver's bond. A demurrer to the declaration was sustained. He elected to stand by his declaration and he was adjudged to go hence without day and to pay the costs. Thereupon he sued out this writ of error.

Treating every fact stated in the declaration as well pleaded, and some of them are, the most that can be said for it is that it is therein averred that on May 26, 1904, in a certain foreclosure proceeding then pending in the Circuit Court of Cook County, wherein Jennie A. Carroll was complainant and Amos H. Swift et al. were defendants, one R. Wilson More was appointed receiver to collect rents from the premises described in the bill, and known as "No. 151 Honore street, Chicago"; that he gave bond as such with appellee as surety; that on June 2, 1905, that suit was consolidated with another then pending in the same court, wherein Charles E. Titley was complainant and Amos H. Swift et al. were defendants, and that the receivership was extended to include both suits so consolidated without requiring the receiver to give additional bonds; that on February 8, 1909, an order was entered in the consolidated cases requiring some receiver theretofore appointed, but whose name or date of appointment is not mentioned in the order, to pay to the complainant in the case of Titley vs. Amos H. Swift

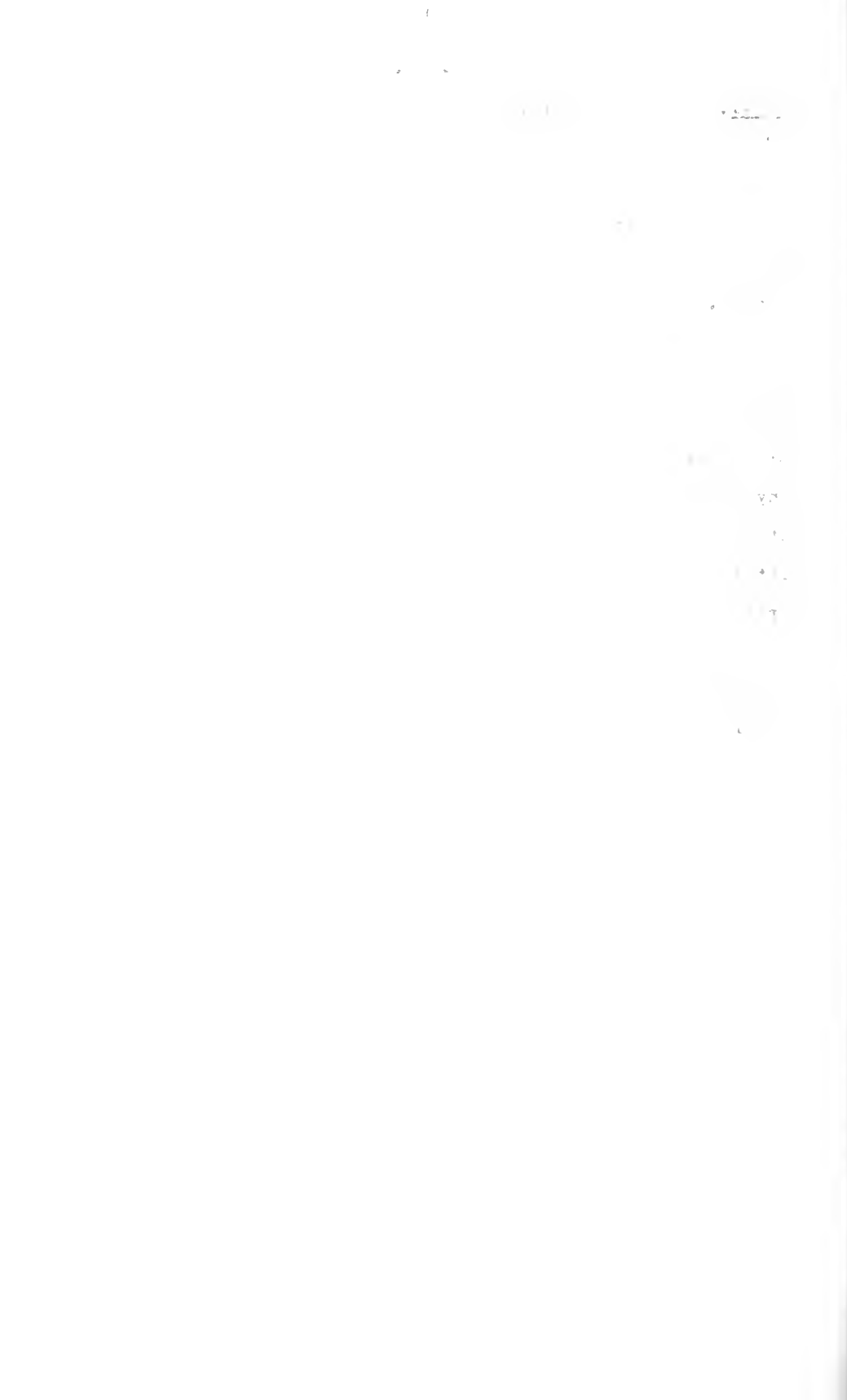


et al. the sum of \$211.82, together with interest therein at 5% per annum from March 27, 1906, out of funds in his hands derived from the rents of premises described in the bill, and that he has not complied with that order, by means whereof appellant claims that the appellee is liable to him for that amount.

Besides other fatal defects in this declaration there is no averment in it, or finding in any order or decree there mentioned that R. Wilson More, the receiver, whose bond was signed by appellee, ever had in his possession as receiver any rent whatever derived from the premises in question or any other funds from any source. It certainly requires no citation of authority to support a holding that neither the principal nor surety on a receiver's bond can be held liable for a failure to pay out funds, as such receiver, until it is shown that he has, or at least at sometime has had, funds in his hands as such receiver.

The demurrer to the declaration was properly sustained.

JUDGMENT AFFIRMED.



March Term, 1913, 1914.

107 - 19103.

SAMUEL W. WINEFIELD,

Plaintiff in Error,

vs.

CONGREGATION OF THE RESURRECTION, a  
corporation, et al.,

Defendants in Error.)

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

129 I.A. 594

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error by his bill filed in the Superior Court on February 6, 1912, as afterwards amended, alleges, in substance, that defendant in error, Congregation of the Resurrection, a corporation, on January 9, 1912, then being the owner of the premises described in the bill, acting wholly and solely through one Andrew Spetz, its authorized agent, agreed in writing to lease the said premises to plaintiff in error for the period of ninety-nine years; that the agreement in writing relied on is as follows:

"Received of S. W. Winefield cheque for \$500.00 (Five Hundred Dollars) to be applied on a 99 year lease on the corner Milwaukee Ave. and Central Park, being the S. East cor. and having a frontage of 340 feet more or less, on Milwaukee Ave. and 233 on Central Park Ave. on following condition. Lessee to pay an annual rental of 3000 (Three Thousand) for the first 3 years, and \$5,000 (Five Thousand) per annum for the balance of 96 years. Lessee to pay taxes and special assessments for 1912. Present improvements and building are given to lessee without any charge, and lessee agrees to build a merchantable building on or before ten years, to cost not less than 50,000 Fifty Thousand Dollars. Lessee also agrees to pay four special assessments for paving Milwaukee Ave. which are a lien on said premises.

"Option is given to lessee to purchase said fee or ground on or before 15 years for 120,000, One hundred and twenty thousand dollars.

"This agreement is subject to be approved by Father Andrew Spetz or his attorney. Reasonable time is given for examination of abstract and drafting of lease.

"Chicago, Ill. Jan. 9th, 1912.

(Signed) Andrew Spetz, C. R."

The bill further alleges that the initials "C. R."

following the name Andrew Spetz, signed to the foregoing writ-





ing were an abbreviation for and were intended to mean "Congregation of the Resurrection"; that plaintiff in error then paid to the said Andrew Spetz for the Congregation of the Resurrection \$500 as earnest money "on account of such lease"; that plaintiff in error has expended "sums of money in said premises and has always been ready to perform his part of the agreement and accept a lease pursuant to the terms thereof"; that he "caused a draft of a lease to be drawn pursuant to the terms of the agreement and tendered the same to the defendant for its approbation, but the defendant refused to consider the same and declined to proceed with the transaction or to sign the lease." The Congregation of the Resurrection, a corporation, and Andrew Spetz were made defendants. The specific relief prayed for is that the Congregation of the Resurrection, a corporation, be decreed to execute a lease to plaintiff in error according to the terms of the foregoing writing. No relief is prayed for against Andrew Spetz personally.

The defendants in their answer deny the right of plaintiff in error to the relief sought, on various grounds, the substance of some of which follows:

First, that the supposed receipt-agreement sued on was not and did not purport to be the act of the Congregation of the Resurrection, and that Spetz had no authority from it in writing signed by it to make such a contract for it.

Second, that the letters "C. R." after the name of Spetz signed to the contract were placed there to indicate that Spetz was a member of a religious order of the same name as defendant in error, but entirely distinct from it, and that they were placed there in accordance with a custom of that order and had no reference to defendant in error, was not its signature or an abbreviation of it or placed there with the intention of binding it.

Third, That it was void under the statute of frauds as

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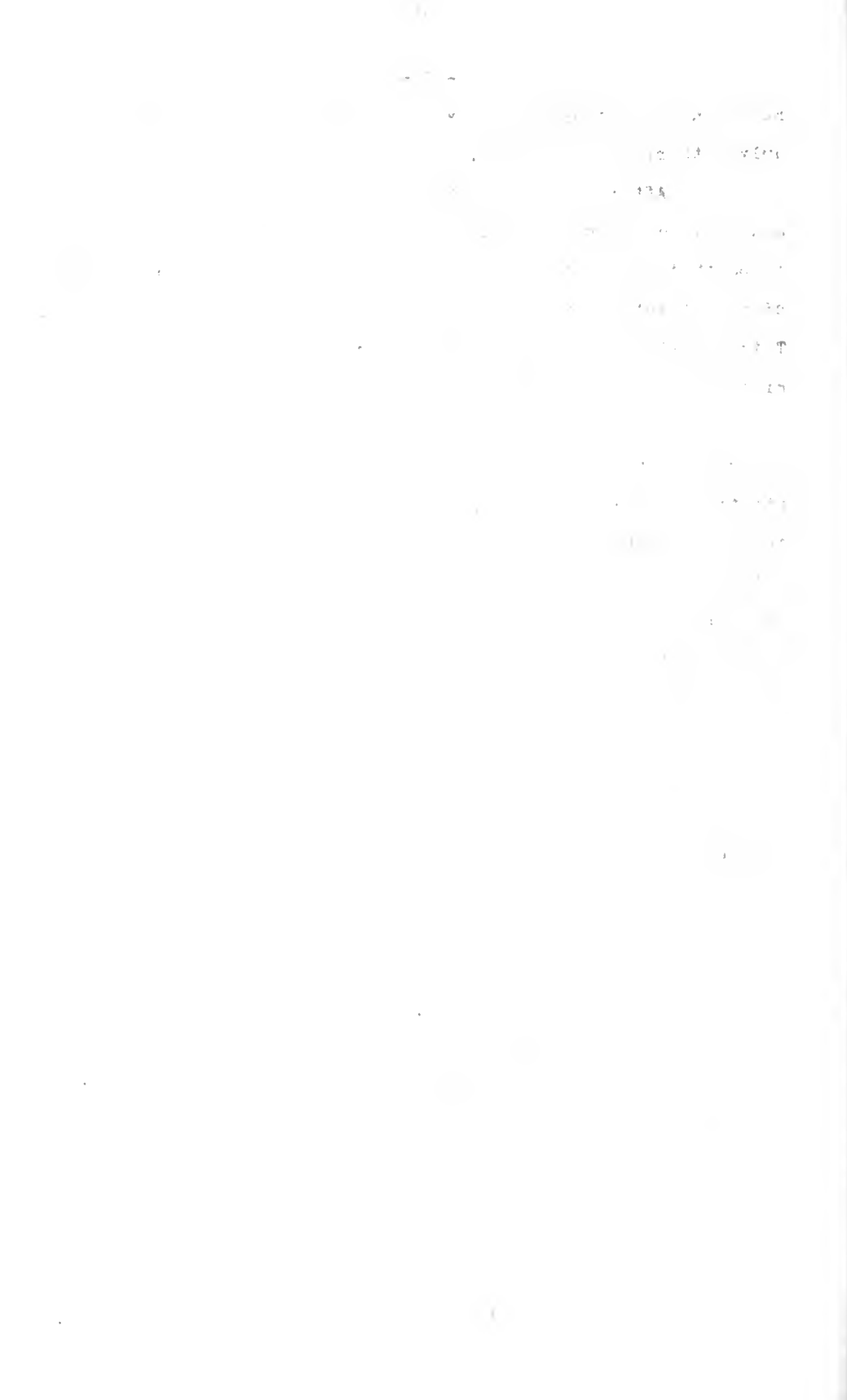
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not being signed by the party to be bound thereby or any one duly authorized to sign it.

After issue was joined the cause was referred to a master in chancery who took proof and reported his conclusions to be that the contract was void, because within the inhibition of the statute of frauds, and that the bill should be dismissed. This report was approved by the court and the bill was dismissed in accordance with the recommendations of the master.

The substance of the findings of the master on questions of fact, so far as the same is necessary for the determination of this case here, is that the signature to the writing was not that of defendant in error; that Spetz was never authorized by it to sign the writing; that the letters "C. R." following the signature of Spetz to the writing were placed there to signify that Spetz was a member of a religious order by the name of "Congregation of the Resurrection", and were not intended to be and were not in fact the signature of defendant in error, the Congregation of the Resurrection; that there was no evidence to show that the \$500 given to Spetz by plaintiff in error was ever given to or deposited in the name of the defendant in error corporation, and that the same was tendered back to plaintiff in error as the money of "Father Spetz", and that possession of the premises in question was never delivered to plaintiff in error.

There were but three objections filed before the master to his report, and but three exceptions to that report were filed in the Superior Court. The substance of none of these objections or exceptions are shown in the abstract. By referring to the record we find that the exceptions filed in the Superior Court are replicas of the objections filed before the master. By these objections and exceptions the sufficiency of the evidence to support the master's findings is questioned.



We have carefully examined both the abstract and the record in this case and are satisfied that the findings of fact of the master are amply supported by the evidence.

The writing itself does not on its face purport to be the undertaking of the "Congregation of the Resurrection" or to bind it. Plaintiff in error having failed to prove that it was its obligation, the master had no alternative but to recommend the dismissal of the bill and the court could have done no less than follow such recommendation.

A discussion by us of other questions argued by counsel is, therefore, unnecessary.

The decree of the Superior Court is affirmed.

DECREE AFFIRMED.



March 1911, 1912, 1913.

137 - 19134.

~~HOCH BROTHERS COMPANY~~, a corporation,  
Defendant in Error,

vs.

JIFFY AUTO CURTAIN COMPANY, a corporation, and FRANK H. ILSE,  
Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

199111-26

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Defendant in error is a corporation. It was engaged in the business of selling artificial leathers and mohairs. The goods sold by it were used in the manufacture of automobile and other vehicle tops and curtains. Plaintiff in error, Frank H. Ilse, is the patentee of a vehicle curtain known as the Jiffy curtain. Plaintiff in error, Jiffy Auto Curtain Company, is a corporation organized in the State of Delaware. It was duly authorized to do business in this state. It controlled the Jiffy curtain patent. Mr. Ilse, the patentee, was its president and general manager. At the time involved in this suit it was engaged in experimenting with a view of perfecting the Jiffy curtain. The French Auto Top Supply Company, now bankrupt, was then in the business of manufacturing and selling the Jiffy curtain. Mr. Ilse, the patentee, was its secretary, treasurer and general manager. The offices of the Jiffy Auto Curtain Company, the French Auto Top Supply Company and of Ilse, the patentee, were all at 1805 Michigan Avenue, Chicago. Suit was begun by defendant in error against the Jiffy Auto Curtain Company, Frank H. Ilse, the patentee, and the French Auto Top Supply Company, to collect for goods claimed to have been delivered at the common office of all three defendants. It was later dismissed as to the French Auto Top Supply Company,





and upon trial resulted in judgment against the Jiffy Auto Curtain Company and Frank H. Lee, who have moved out this writ of error. The amended affidavit of Lee filed by defendant in error charges that before the goods were delivered to the French Auto Top Supply Company, the said Lee and the said Jiffy Auto Curtain Company individually and jointly with the French Auto Top Supply Company promised that if defendant in error would deliver said goods to the said French Auto Top Supply Company, they would pay for the same. Plaintiff in error, Jiffy Auto Curtain Company, by its affidavit of veritas, denies that it either jointly with Lee or individually promised to pay the bill in question, denies that it received any of the goods mentioned in the bill and for, and avers that such an agreement was ultra vires and void under the statute of frauds. Plaintiff in error, Lee, by his affidavit of veritas, makes the same defense as the Jiffy Auto Curtain Company, except the defense that the alleged contract was ultra vires.

We think the evidence introduced at the trial fairly tends to support the finding that plaintiff in error, Lee, by his original promise made to defendant in error before the goods in question were delivered, and that he agreed to and with defendant in error to, if it could sell or deliver the goods in question to the French Auto Top Supply Company, he would personally pay for the same. The evidence, however, wholly fails to show that the Jiffy Auto Curtain Company ever promised to pay for the goods under any conditions or that any one either with or without authority either in writing or orally ever attempted to so promise for it. The evidence does disclose that the Jiffy Auto Curtain Company was a commercial corporation merely, and that it had no authority to become the guarantor of the obligations of others. Without such authority any attempt on its part to do so would have



been void. Of such a corporation the Supreme Court of Illinois in Wheeler v. Home Savings and State Bank, 138 Ill., 34, says: "Such a corporation has no corporate power to become the mere surety of another or pledge its property for the payment of the debt of another in which it has no interest or for which it is in no wise responsible, and for mere accommodation." To the same effect is the holding in the following cases: Schneider v. Chicago Vulcanizing Co., 189 Ill. App., 623; Cent. Trans. Co. v. Pullman P. C. Co., 139 U. S., 24; Natl. Home Bldg. Assn. v. Home Savings Bank, 131 Ill., 35; Piper v. Garcia & Sons et al., 183 Ill. App., 399. For the reason that the judgment against the Jiffy Auto Curt Company is not supported by the evidence the same must be reversed.

The judgment in this case was joint against Frank H. Ilse and the Jiffy Auto Curtain Company. When a joint judgment against two or more defendants who are sued on the same theory of liability, and who rely on the same theory for a defense, is reversed on appeal or writ of error as to one of such joint defendants, it must be reversed as to all. The cases holding the foregoing proposition are too numerous to be here cited. Some of these may be found by referring to Vol. 1, Ill. Cyclopaedic Dig. 693, note 53 to 71 inclusive. The mere fact that the Jiffy Auto Curtain Company claims in this case that such a contract as is here sued on would have been ultra vires does not constitute such a special defense as to take this case out of the general rule. The real defense relied on by it, as well as by Ilse, is that it never made the contract sued on. It is because defendant in error failed to establish the fact that the claimed contract was made by the Jiffy Auto Curtain Company that this judgment is reversed.

The judgment of the Municipal Court is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

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EMMA BOULTER,  
Appellant,

vs.

CLAYTON CUNNINGHAM, FRANKLIN  
STILLWELL and JACOB D. ROSENBERG,  
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

189 I.A. 597

MR. JUSTICE GRAVES DELIVERED THE OPINION OF THE COURT.

Appellant filed her bill in chancery in the Superior Court on November 16, 1912, to redeem certain lands therein described from a sale made on June 6, 1911, under a decree of foreclosure. A general and special demurrer to this bill was sustained by the court and the bill was dismissed for want of equity. This appeal has been perfected to test the correctness of this ruling of the court.

If it be conceded that appellant has shown by her bill that she is the bona fide assignee for value of all the right, title and interest the mortgagor could convey on July 1, 1912, which is her contention, still, the bill fails to show facts entitling her to the relief sought. The foreclosure sale occurred June 6, 1911. The statutory period of redemption given a mortgagor and those holding under him expired on June 8, 1912, almost four weeks before she claims to have acquired the right to redeem. It is not even contended by appellant that she ever had any right to redeem by reason of the provisions of the statute. She, however, has averred that on June 1, 1912, a month before the date she claims to have acquired her right to redeem, the period of redemption was extended by contract between the mortgagor and the trustee named in the trust deed and the holder of the certificate of purchase, to September 3, 1912; that the master's deed was not in fact actually made and delivered until October 3, 1912; that she

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did not know until October 12, 1912, that the premises had been sold or that the foreclosure proceedings had been started, and that those facts were fraudulently concealed from her by the trustee named in the trust deed whom she avers was the real though not the nominal purchaser at the sale. From these averments it is argued that as she was the owner of the equity of redemption for two months before the expiration of the time limited by contract for redemption and for three months before the master's deed was actually made, she could and would have redeemed the same if the knowledge of the sale had not been fraudulently kept from her. It is not averred or contended that the mortgagor was not a party to the foreclosure suit or that she was not served with process, or that she was not fully cognizant of all that transpired in connection with that proceeding. A foreclosure proceeding is les pendens until the decree is executed by delivery of possession of the premises, to the grantee in the master's deed. Jackson v. Warren, 33 Ill., 331-340. One who purchases pendente lite any rights in property that is the subject of a decree is to all intents and purposes a party to the decree, and can not be heard to say that he does not know of the pendency of the suit and the steps that are taken therein. Jackson v. Warren, supra; Meier v. Hilton, 357 Ill., 174-179; Davis v. Conn. Mut. Life Ins. Co., 84 Ill., 508-510; Harris v. Ile, 162 Ill., 190-193.

The allegation that the fact of the pendency of the foreclosure proceeding and the sale of the premises were "fraudulently concealed" from appellant is a mere conclusion and amounts to nothing in the absence of averments of facts constituting the fraudulent conduct complained of. Langlois v. McCulloch, 181 Ill., 195; Murphy v. Murphy, 189 Ill., 360; Anderson Transfer Co. v. Fuller, 174 Ill., 221; Dexter v. McAfee, 163 Ill., 509; Warren v. Howe, 44 Ill. App., 157;

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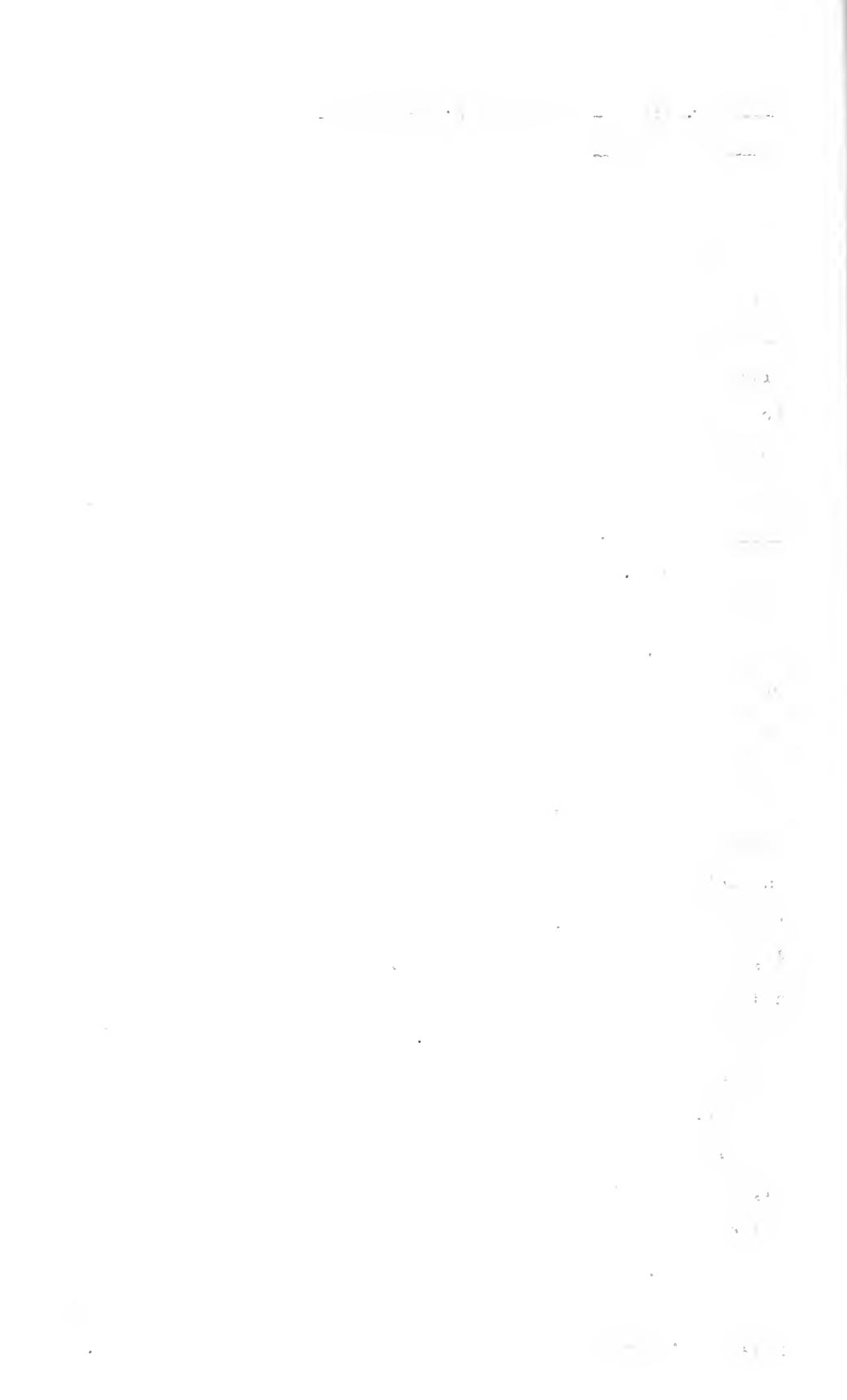
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East St. Louis Connecting Ry. Co. v. People, 119 Ill., 128;  
Emery v. Cochran, 82 Ill., 65.

The bill is further defective in that there is no averment that appellant has ever paid or offered to pay or tendered, or was willing to pay to any one the sum of money for which the premises were sold or bid off with interest thereon from the date of the sale. The only thing in the bill concerning the subject of payment of any amount by appellant to any one as redemption money is in the prayer and is in the following language: "That it may be declared that on payment by your orator of the sum of \$1,325 to the legal holder of the note hereinbefore referred to and interest thereon at the rate of 5 per cent. per annum from July 1, 1912, the said lots and premises are the absolute property in law and in equity of your orator." If that language could be construed to be an offer of \$1,325 and interest from July 1, 1912, it would not be sufficient for several reasons. First, the interest that accrued after the sale and before July 1, 1912, is not included in the offer. Second, by the language quoted it is proposed to pay to the "legal holder of the note" the \$1,325 and interest when the bill discloses that the trust deed given to secure the note in question had been foreclosed and that the \$1,325 bid therefor had been paid, and that the master's deed had been delivered to the holder of the certificate of purchase, before this bill was filed, and that the holder of the note and the holder of the title to the premises are two distinct persons. It is, therefore, apparent from the averments in the bill that the legal holder of the note has no claim on the \$1,325 and that a decree to redeem from the holder of the legal title could not be awarded on payment of the money to the holder of the note.

There may be other reasons why the demurrer was properly sustained, but it is unnecessary to discuss them here.



The decree of the Superior Court is affirmed.

DECREE AFFIRMED.



417 - 18463

GEORGE MINDROP,

Appellee,

vs.

ROBERT GAGE, etc., et al.,  
On Appeal of the MODERN STEEL  
STRUCTURAL COMPANY, a corporation,  
Appellant,

and

15 - 18786

GEORGE MINDROP,

Defendant in error,

vs.

ROBERT B. GAGE, impleaded with  
the MODERN STEEL STRUCTURAL  
COMPANY,

Plaintiff in error.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

189 I.A. 599

APPEAL TO CIRCUIT COURT  
OF COOK COUNTY.

MR. PRESIDING JUDGE BROWN

DELIVERED THE OPINION OF THE COURT.

Cause number 18463 is on appeal by the Modern Steel Structural Company, one of the two joint judgment debtors in a judgment of the Circuit Court of Cook County for \$4000, entered November 22, 1911, in favor of George Mindrop. The other judgment defendant and debtor is Robert Gage, who has sued out from this Court a writ of error in order to reverse the same judgment. This writ of error is cause No. 18786. It was consolidated for hearing with No. 18463, and the transcript of record in 18463 was on motion of the plaintiff in error ordered to stand as a return to the writ in 18786. The plaintiff in error Gage has neither joined his fellow judgment debtor as a co-plaintiff in error nor taken out a summons in severance against it. This omission will compel us, after the appeal of the Steel Company has been disposed of, to dismiss the writ of error sued out by Gage. In the

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view, however, which we take of this cause this makes no embarrassment.

The judgment being joint, if it is erroneous as to one it must be reversed as a whole, under the law so often announced in this state. The causes were heard together and the briefs and arguments filed and made in behalf of Luge in the writ of error have been as thoroughly weighed by us in the consideration of the appeal of the Modern Steel Structural Company as if filed and made originally in that cause. The contest is in a certain sense a triangular one. Lindrop insists that both defendants in his suit - the Steel Company and Gage - are liable to him for the injuries which formed the basis of his suit; but the Steel company is naturally content to negative its own liability by insisting that Gage was an independent contractor, in whose employ the plaintiff was working at the time of his injury, and for whose defaults it - the Steel Company - has no responsibility; while Gage, less naturally, after having in the trial of the cause sworn with great emphasis to a state of things which would make him such an independent contractor, by his counsel in this court specifically contends that at the time of the accident resulting in the plaintiff's injuries he was in fact no longer an independent contractor, but the mere employee and vice principal of the Steel Company, and that while the Steel Company may be liable, he certainly is not.

Both the defendants (as we shall hereafter in this opinion describe them) unite, however, in the contention that they cannot be held jointly, and that therefore the judgment so rendered must fall as a whole according to the rule in this state, to which many cases are cited by us in *Eckels v. Parley*, 131 Ill. App., 557.

With this common contention of theirs we are

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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also obliged to agree for reasons which can only be intelligibly stated after a recital of the matters which gave rise to the suit and of occurrences during the suit antecedent to the judgment.

August 31, 1910, the plaintiff Sindrop was working in the erection of the structural iron for a building known as the O'Leary Warehouse. The location of this building was at Clearing, Illinois, and a contract "to provide all the materials and perform all the work for the iron work" of said building had been made with the owner, the Arthur J. O'Leary & Son Co., by the Modern Steel Structural Company under date of June 21, 1910.

Under date of July 26, 1910, the firm of Rasmussen & Gage, signing the communication "Rasmussen & Gage, Robert B. Gage", made a written proposal to the Modern Steel Structural Company, the essential parts of which for the purposes of this litigation are as follows:

"Modern Steel Structural Co.,  
Waukesha, Wis.

Gentlemen: We hereby propose to unload, erect and rivet structural steel for Arthur J. O'Leary & Sons Company Warehouse and Leanto Building at Clearing, Illinois, according to plans shown our Mr. Gage when he was recently at your office, and to the satisfaction of the architects, Messrs. Reader & Wood, for the sum of seven and 80/100 dollars per ton, and that sum shall be paid in current funds as the work progresses; \* \* \* \* \* It is understood that if at any time during the progress of said work we become bankrupt or should refuse or neglect for a period of three days after notice in writing by ourselves or the architects to supply a sufficiency of tools or workmen or cause any unreasonable neglect or suspension of the work or fail or refuse to follow the drawings or comply with any of the provisions hereof, you shall have the right and power to enter upon and take possession of the work and may at once terminate this contract, whereupon our claim of you shall cease and you may provide materials and workmen sufficient to complete the said work, and the expense of the notice and the cost of completing the erection shall be deducted from the amount of this contract or any part of it due or to become due to us. \* \* \* \* \* It is further agreed that we will carry Employees and Public Liability Insurance, in some approved liability company, of sufficient amount to fully protect the owner and yourselves from all damage.

We agree to assume entire charge of all material and labor connected with this job, so that it will require no attention from your office after its arrival at Clearing.

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Illinois, and to erect the same in an expeditious and workman-like manner, satisfactory in all respects to yourselves and the architects. \* \* \* \* \*

Your acceptance of this proposition will constitute a contract between us."

Upon this proposition, signed as before set forth, the Modern Steel Structural Company wrote -

"Accepted.

Modern Steel Structural Company,  
B. B. Harding."

Harding was the President and General Manager of the Modern Steel Structural Company. The firm of Rasmussen & Gage at this time apparently consisted of H. I. Rasmussen, Robert Gage and W. F. Bridge. That firm entered on the construction described in the contract, but there was serious trouble between the partners before the accident to Hindrop. Rasmussen before that time dropped out much under the displeasure of his quondam partners. When Bridge also severed his connection with the firm, very informally, according to his testimony, is left somewhat indefinite by conflicting statements of the witnesses in this cause. Documentary evidence, however, the authenticity of which, in spite of denials, we do not doubt, would show that it was not until after the date of this accident. It is of no importance in our discussion of this case. It is plain that at some time Rasmussen and Gage, both, left Gage to carry on the business once prosecuted under the firm name of Rasmussen & Gage. Whether the contract between the Steel Company and "Rasmussen & Gage", under which this work on the O'Leary warehouse was begun, was in force at the time of the accident is one of the matters hotly contested in this litigation. Discussion of it in this opinion will be deferred until the circumstances of the accident are stated. On beginning the work to be done under the contract, Gage, who had charge of the actual work, hired one Owen Keetley to act as foreman of the men employed



on the job. There was a derrick in operation by which iron columns were put in place. There was testimony at the trial below that this derrick was "set on a few planks", that when it moved heavy loads, such as an iron column, "it would", in the language of one witness, "generally kick up behind and sink down in front and switch around." In the words of another witness, during the week preceding the accident "the ground was soggy and wet"; "that when the derrick would sink into the mud, the whole gang would pry it out", and they "raised that derrick up out of the mud five or six times a day"; and "when this derrick was carrying a load it would swing out in front, down in front and kick up behind."

August 31st Keetley ordered the plaintiff, Mindrop, and another workman named Barber, to hook a chain to a column that it might be raised by the engine. Mindrop and Barber hooked the chain on the column. They did not, however, place the chain around the column because the column was lying so close to the ground that this could not be done. They hooked the chain to the flanges of the column merely, intending to raise the column off the ground, block it up, and then put the chain around it in such a manner that it could be raised into its destined place. When they had fastened the hook to the flanges Keetley signalled the engineer to start his engine. The engineer did so and the column rose several feet from the ground. Mindrop and Barber then called out, "That will do - that is high", indicating that the point had been reached at which the hoisting should cease for the hook and chain to be readjusted. Keetley, who says he thought that they "had the chain around the column all right and had hooked it in", made at this point the mistake of directing the engineer to go on with the hoisting, saying, "I am running this work, and when I give you a signal you want to pay attention



to me." Then, says Keetley, the engineer "went ahead and the derrick sank down on the bottom of the mast and the right end slipped up and the column went down and landed on Mindrop, and we all had to get together and pick the column off of him." Mindrop thus received the injuries for which this suit is brought, and no question can be reasonably made of the amount of the verdict if the defendants are liable.

Keetley testified on cross examination that the accident thus occurring occurred through his mistake and by his fault entirely.

There could of course be no doubt of the liability of Keetley for the injuries suffered by Mindrop if this statement was accurate, whether the accident was due entirely to the insecure fastening of the neck and to the immediate order given by Keetley, or was complicated or connected with an unsafe and improper location of the derrick. But the question for whom Keetley was vice principal and who, therefore, might be liable under the doctrine of respondent superior under the common law rule, was open and became the subject of dispute thereafter, as will be seen. Moreover, it is maintained by plaintiff, as will hereafter be seen, that if the insecure situation and standing of the derrick contributed to the accident, as plaintiff insists it did, other persons besides Keetley were under a statutory liability for it, imposed by the Act of the General Assembly approved June 3, 1907, entitled -

"AN ACT providing for the protection and safety of persons in and about the construction, repairing, alteration or removal of buildings, bridges, viaducts and other structures, and to provide for the enforcement thereof."

This liability, it is now contended by plaintiff, extends, under the circumstances of this case, to the appellant, the Modern Steel Structural Company, and to Gage, jointly,

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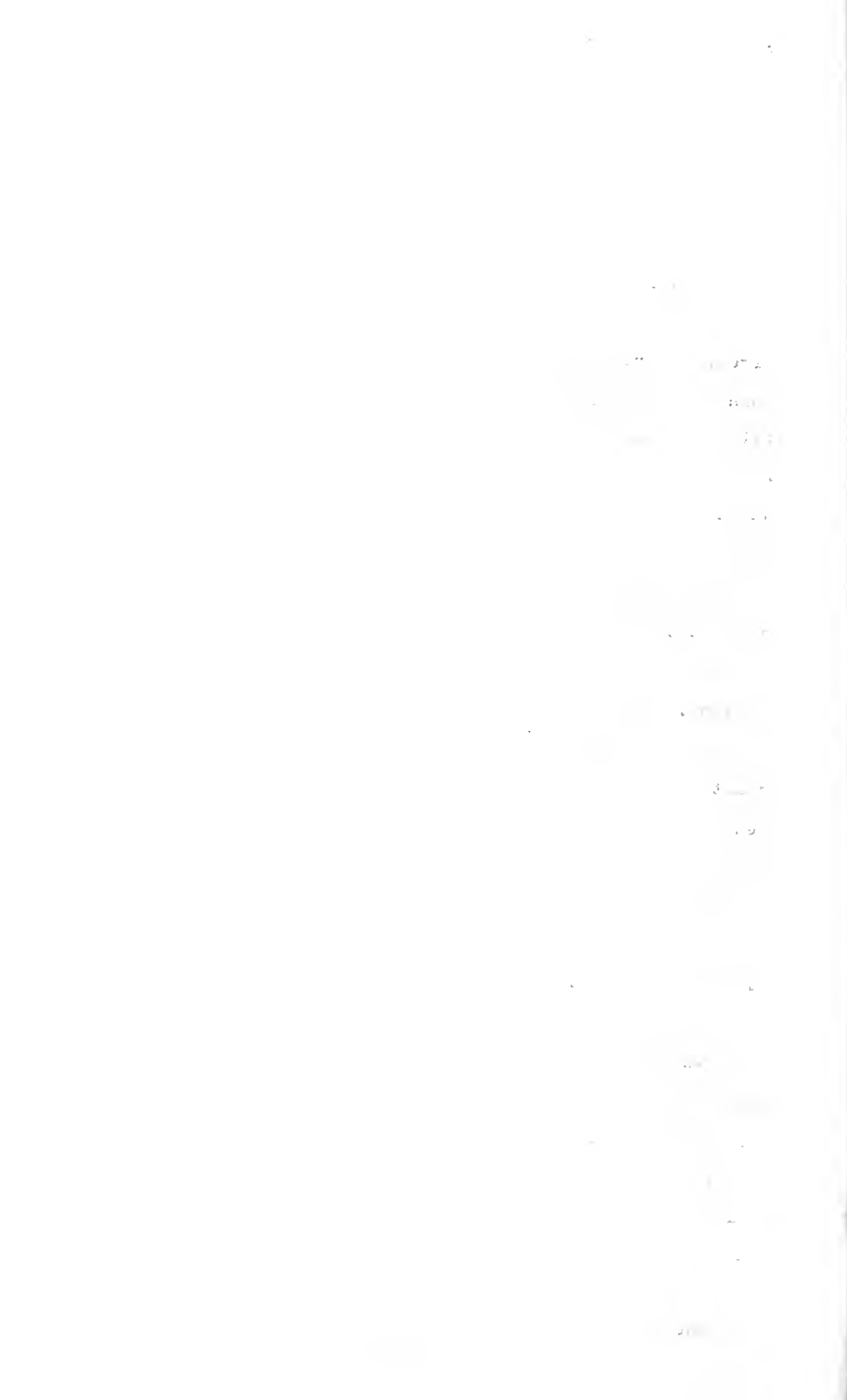
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and makes the judgment defensible whether or not the contract between the Company and Cage, hereinbefore recited, was in force at the time of the accident or not. This contention will be hereafter discussed.

October 5, 1911, the plaintiff began an action in the Circuit Court against "Eugene F. Rasmussen and Robert Cage, doing business as Rasmussen & Cage." December 1, 1911, he filed in said action a declaration in two counts. In the first he charged that the defendants while setting the column in place by their agents and servants ordered the plaintiff "to hold the column in order to allow the defendants to properly hook the same", and that it was their duty so to operate "the derrick and hook and falls and other parts, that the same or any part thereof should not slip and fall from the column", but that they negligently moved the column without warning so that it fell on the plaintiff. In the second count he charged that under the Statutes of Illinois the defendants had the duty of erecting, placing and operating the derrick so as to give proper protection to any person engaged thereon and so as to prevent the falling of any material used thereon, which duty they neglected, to the injury and damage of the plaintiff.

Cage only was served; Rasmussen was not found. Cage was defaulted on March 1, 1911. On March 17, 1911, an order was entered allowing the plaintiff to amend all papers and proceedings by making the Modern Steel Structural Company a party defendant and allowing the plaintiff to file additional counts to the declaration instantener. The counts filed were the same as the two original counts before recited, with the addition of the Modern Steel Structural Company as a party defendant, so that Rasmussen and Cage and the Steel Company stood charged with joint neglect of duty resulting in injury.



The Steel Company was served and on April 18, 1911, pleaded "not guilty." September 25, 1911, an appearance was entered in the cause for Robert Gage. September 28, 1911, the default of Gage was vacated and he filed a plea of not guilty.

On the pleadings stated the parties went to trial on September 29, 1911. During the trial the original counts of December 8, 1910, were withdrawn. The trial lasted two full weeks, a verdict being returned on October 13, 1911, in favor of the plaintiff for \$4000. Regrettable and objectionable conduct of counsel on both sides marked the progress of the case. This was due doubtless to the intense bitterness which had been injected into the controversy by the direct conflict of testimony on material points and the charges, expressly made or insinuated against parties interested, of perjury, forgery, subornation of perjury, intimidation of witnesses and completed murders, including, as to some of the charges, counsel as well as parties and witnesses. So evenly could blame be divided between the counsel that it is not worth while further to animadvert on the indecorous character of the proceedings at the trial, or, so far as counsel are concerned, to say more concerning the charges made of bribery and subornation of perjury than that they were completely disproved and that no imputation of anything worse than exhibitions of bad temper and bitterness before the court could be in fairness entertained against any of them after a careful consideration of this record. But the method of conducting the trial adopted and the interjection of these various charges and their refutation brought into being a bill of exceptions of fourteen hundred pages to be added to the common law record of a hundred more.



There were sixty-eight instructions given to the jury.

To this entire mass of typewritten matter and to all the objections and questions raised therein and to all the arguments based thereon, we have given, as our duty required, considerate and careful attention. As the necessity for it the delay in the disposition of this cause is due.

During the trial the main question, around which the protracted contest and prolix testimony centered, was whether on August 31, 1911, the contract between the Modern Steel Structural Company and Gage had been cancelled, and Gage had become a superintendent or manager of the work for the steel company, occupying an intermediate position of control between that company and Keetley; or, to put it at once more comprehensively and briefly, whether the company was in control of the work on that date. We mention this at this point not because we think that either answer to the question would necessarily be controlling on the correctness of this joint judgment, but because of its bearing on the question, which has been raised and must be decided, of the effect of the state of the pleadings on the rights of the appellee.

Immediately on the rendition of the verdict the defendants moved for a new trial. This motion was not brought to a hearing until November 22, 1911, when it was disposed of.

On November 21, 1911, it was on motion of the plaintiff ordered that he have leave "to amend the second additional count to the declaration filed in said cause instantaneously and to file an additional count to the declaration filed in said cause instantaneously."



The amendment of the said second count of March 17, 1911, made in pursuance of the leave, was not, in our view, important. It added a few words and changed a word in the "virtute cuius" from "negligence" to "willful misconduct", of which "willful misconduct", therefore, the injuries were charged to be a direct result.

Instead of "an additional count" only, as the order reads, the plaintiff filed on November 21, 1911, three "additional counts." There was a motion by the defendants the next day, however, (November 22, 1911) to strike out these additional counts, which motion was denied, so that all three may be considered as having been filed with leave and no specific assignment of error calls in question the rightfulness of the order allowing an additional count or refusing to strike out the counts that were filed. There were, however, exceptions reserved to the allowance of the motion for leave to file "an additional count." All of the three counts of November 21st assert the basis of the joint liability to be that the Steel Company was the operator of the derrick and the employer of the plaintiff, and that defendant Gage was the superintendent of the Company; that the defendants had the duty to place the derrick on a safe place and violated that duty by placing it on soft and yielding ground. The first and third of the counts also assert that the defendants negligently caused the load to be suddenly moved and that the net result, as to speak, was the accident. The third count specifically charges that the defendants negligently placed the derrick and that the Steel Company employed Keetley as its foreman under Gage; that Keetley acted as foreman under Gage; that Gage had general supervision and control of the work for the Steel Company, and that Keetley carelessly ordered the boom of the derrick





to be suddenly shifted and "by reason of the joint and concurrent negligence of the defendants and each of them co-operating with the negligence of their servant, Owen Keetley", the accident happened.

The second count of November 21st is specifically based on statutory liability. It says that the Steel Company employed the plaintiff as an iron worker and Gage as its superintendent having charge of the appliances and workmen, and that Gage was in charge of the derrick and the placing thereof "on behalf of the other defendant, the Modern Steel Structural Company, and with their knowledge and consent and subject to their orders and directions." It further asserts that the defendants did not erect the derrick safely in accordance with the statute (of 1907), and that as a direct result of the wilful violation of the statute and of the wilful failure of the defendants to comply with the provisions thereof, the accident happened.

After denial of the defendants' motion on November 22, 1911 to strike the additional counts of November 21, 1911 from the files, the following order was entered by the Court:

"It is ordered that the defendants' plea of general issue filed herein stand as pleaded to all counts of said declaration, and on like motion leave is given the defendant Modern Steel Structural Company to file a special plea to all counts of the declarations filed in said cause, instantar."

In pursuance of said leave the Steel Company filed on said November 22nd a special plea, in which it asserted that it was not engaged in the erection of the Henry warehouse; that on July 28, 1910, it let the contract for the unloading, erection and riveting of all the structural steel for said warehouse to the firm of Rasmussen & Gage, who thereafter were succeeded by Robert B. Gage; that there-

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after Rasmussen & Gage and their successor Gage "took charge of and had absolute and complete control of" all said work, "free from any supervision or control by the Modern Steel Structural Company"; that the plaintiff was the servant of Rasmussen & Gage or Gage, and not of the Steel Company, and that the hoisting apparatus and derrick were not at the time of the accident the property of the defendant "nor under its management, control or supervision nor in its possession."

On the same day, November 22, 1911, the motion for a new trial was heard and denied, as was also a motion in arrest of judgment. Judgment for \$4000 was then entered upon the verdict against both defendants.

The proposition was vigorously insisted on by the plaintiff in argument in this Court, that under the state of the pleadings detailed neither of the defendants can deny the operation and control of the instrumentalities, that is, of the hoisting apparatus which did the injury.

Apparently because the abstract (mistakenly) describes the special plea as though filed only to the additional counts filed November 21, 1911, it is maintained that it does not apply to the counts filed March 17, 1910, and that therefore the general issue standing alone to those counts, the doctrine of *Traction Co. v. Jerka*, 227 Ill., 95, and of similar cases, holds admitted the "ownership, control and employment" necessary to make the Company as well as Gage liable for Keetley's negligence.

The answer to this is obvious. The general issue does not stand alone to these counts. The special plea of November 22nd was directed to the entire declaration as it stood at that time. "Amended declarations" mentioned in the plea means everything in the way of a declaration then on file.

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Criticism might well be made of the exercise of the discretion of the Court in allowing more than a month after the trial additional counts to a "declaration" which he had mentioned as a controlling factor in a large number of 65 instructions given at the trial and had specifically defined in the 66th as meaning "the two additional counts filed March 17, 1911". But however unwise this rearrangement of the pleadings after the trial may have been, if the declaration was to be thus amended to suit the plaintiff's evidence, certainly the plaintiff cannot complain that one of the defendants should be allowed to plead to suit its evidence on a point on which there could be no surprise, as it had been the center of contest in the two weeks wrangling.

And if this plea was properly filed it makes effective the defense, if made out, that the Company was not in control of the instrumentality doing the injury nor the "superior" who should respond for the negligence of Keetley.

As we hold that the state of the pleadings has not foreclosed the Steel Company at least from denying the joint liability of itself and Cage, the question of the propriety of this joint judgment would be easy to answer if we should ignore for the moment the statute of June 3, 1907.

Under the common law, to render the Steel Company and Cage both liable, they either must jointly have been the principals of whom Keetley was a servant, (if it was Keetley's negligent order that produced the accident, or both jointly in control of a derrick unsafe in its operation because of its location, for which both were jointly to blame. Of neither of these conditions can we find any evidence whatever in the record. If it inheres in the verdict of the jury that they so found, the verdict is without basis in the evidence and against its clear weight.

✓ The plaintiff said in his testimony that -

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"The boom would lift the column clear off the ground if the chain was on properly. The chain wasn't on properly; it was just hooked on with a hook. It should have been fastened right around the column, hooked in behind. The chain itself should have been wrapped around the column. We didn't do it that way because we couldn't get hold of it. It was buried in deep mud. \* \* \* \* The chain was hooked on properly to raise it as high as we intended to raise it; it was all right for what we intended to do." X

We think this accurately states the cause of the accident and it involves the conclusion, in the language of the appellant Company's argument, that the accident would have happened just the same if the boom had not "cucked", and would not have happened if the negligent order had not been given; in other words, that the proximate cause of the accident was the order of Keetley to raise the column into position when there was merely a temporary hitch on it for the purpose of pulling it off the ground and not for the purpose of raising it into position.

If Keetley and his negligent order were alone to blame, as he says they were, and as, under this theory, they would be, then the employer of Keetley would be liable, whether it were Gage or the Steel Company. But they would not both be. If Gage was an independent subcontractor and Keetley his servant, the doctrine of "respondent superior" would not extend the liability to the original primary contractor for the building. Nor, if at the time of the accident Gage was not an independent contractor, but the superintendent or manager for the Steel Company, immediately in control of the work between the Company and the foreman Keetley, (which is the plaintiff's theory) would the doctrine of "respondent superior" hold Gage for this negligence of Keetley's, there being no evidence of Gage's presence or participation in any form whatever in the negligence of the servant. The liability would rest only on the employer and the negligent employee or employees, not as well on all intermediate

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grades of service against whom no negligence was proven.

And even if we were to assume that the jury might justifiably decide that the unsafe location of the derrick was at least a concurrent cause of the accident, it would not materially change the considerations which would affect the common law liability of the parties. In that case Gage might be held responsible under the common law for the operation of the derrick in that unsafe location if he were the person who located and operated it there; or the Company might be liable if it was the negligent party in that regard, but there is no evidence that we can find that they both jointly or both severally had so located or were so operating it at that place.

In a case, however, tried as this was, exhaustively, with everything put and allowed in evidence which it is reasonable to suppose could throw any light on the question, it would be unjustifiable for us, because the cause must be remanded and one or other of the parties defendant eliminated, to refrain from expressing our opinion as to the matter so hotly contested, namely, whether on August 31, 1910, the contract between the Modern Steel Structural Company and Gage was in force.

On the record which comes to us, we have no hesitation in saying that a verdict which necessarily involved the finding that the contract in question was cancelled before that date would be against the weight of the evidence. We do not propose to lengthen this opinion by a detailed discussion of the evidence on this point, all parts of which and every word of which we have considered. It is sufficient to say that both Gage and Bridge, testifying in direct contradiction concerning the alleged cancellation by agreement on August 23, 1910, were to our minds so shown to be untrustworthy



and unscrupulous by their own admissions and contradictions and attempted explanations on the stand, that their testimony should be considered as valueless when it contradicts the testimony of undisputed witnesses. Disregarding them both on this point, we are led to form our opinion more by documentary evidence, which does not lie and was not evidently framed to meet any preconceived theory, than by anything else in the case. That documentary evidence is, however, consistent with and confirmatory of the testimony of the undisputed witnesses who contradict Bridge. It is not consistent, we think, with the testimony of Bridge.

If it necessarily inhered in the verdict of the jury that the contract in question was cancelled before the accident and that before that time the Steel Structural Company became the operator of the derrick and the employer of Festley and the plaintiff, we should hold the verdict to be against the weight of the evidence on that ground.

But the greatest and most plausible emphasis in the plaintiff's argument is placed on a statutory liability and on a position which under the assumption that the jury justifiably found the unsafe location and erection of the derrick the sole or a contributing cause of the accident, would render it immaterial whether the Structural Steel Company was or was not the operator of the said derrick or had or had not any actual participation in its location and in its being worked on that location. It is thus expressed in the appellee's argument:

"It could not make any difference as to defendant's liability under the statute whether the Modern Steel Structural Company was in charge of this work, as the original contractor, with Tuge as its foreman, or whether Tuge was in charge of the work as a subcontractor under the Modern Steel Structural Company."

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imposed a common duty upon them both in any event."

This thesis is supported by a forceful and able argument. But it has not convinced us. In construing precisely similar language in a city ordinance in *Gibbons v. Chapin & Gore*, 147 Ill. App., 375, and 179 Ill. App., 12, we held that an ordinance which read, "It shall be the duty of all owners, contractors, builders or persons having control or supervision of all buildings in course of erection \* \* \* to see that all \* \* \* openings in the floors shall be covered or properly protected", did not impose a statutory duty on any person in the classes named who did not have control or supervision of the building. The Court of Appeals in New York has made a similar decision in construing similar language. *Rooney v. Brogan Construction Co.*, 194 N. Y. 33. The statute involved in the case at bar, after having declared in its first section that -

"All \* \* hoists (and) cranes \* erected \* \* for \* use in the erection \* of any \* structure shall be erected and constructed in a safe, suitable and proper manner and shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged therein \* \* and in such manner as to prevent the falling of any material that may be used or deposited therein",

says in its ninth section:

"Any owner, contractor, subcontractor, foreman or other person having charge of the erection, construction, repairing, removal or painting of any building, bridge, viaduct or other structure within the provisions of this Act, shall comply with all the terms thereof."

Relying very strongly on an expression of the Supreme Court in its opinion in *Claffy v. The Chicago Dock Company*, 249 Ill., 211, p. 222, as well as upon more general considerations respecting the intent of the statute, the plaintiff maintains that such a construction of the statute as we put on the ordinance involved in the *Chapin & Gore* case would be unjustifiable, and that by the statute a common duty and a common liability are put upon all "owners",



"contractors", "subcontractors" and "foremen" having a connection with the erection of a building, without reference to their "having charge" of it. When one considers the words of the statute, this position is equivalent to this, - that it is implied by the statute that any "owner", "contractor", "subcontractor" or "foreman" connected with any erection must, in the purview of the statute, be held to "have charge of it", and that the words "or other person" are added to cover such person if he too has charge of it. We do not think this is a natural meaning of the language and we do not think the Supreme Court has so held or meant so to hold in the Claffy case. We do not say this because the language used in the Claffy case is a dictum, inasmuch as the decision in that case was really put on the retention of control by the owner. Judicial dictums of the Supreme Court, even if not decisive of the case in which they are used, of course are considered as guides to our decisions. But in the Claffy case the Supreme Court was construing different language. It was treating of the seventh section of the statute, which says that in a certain contingency mentioned "the contractors or owners shall cause the shafts or openings in each floor to be enclosed or fenced in on all sides." The Supreme Court says that in its opinion this language imposes "upon both the contractor and the owner the duty of complying with the provisions of said section"; but this may well be so without the very different language containing the limitation "having charge of the erection", etc., imposing a common duty not only on the owner and the subcontractor or person having such charge, but also as well on all intermediate "contractors" and foremen connected with the general construction, but who have sublet their contracts or substituted other persons to take charge of the particular work involved, of

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which therefore they no longer have control. The owner mentioned in the 7th section may well be held to stand, both in reason and because of the difference in the language of the sections, in a different position from the "contractor" mentioned in the ninth section. We are therefore not of the opinion that the ninth section of the Act imposes a common joint or several duty on all the persons connected with a given construction and bringing to any one of the classes mentioned in the section, irrespective of their having control or "charge" of the work.

The plaintiff, however, although earnestly contending for the existence of this general obligation, which we do not recognize, insists that without this holding the language of the statute and the actual decision in the Claffy case are conclusive in his favor. He maintains that if we are of the opinion (as we are) that Gage was an independent subcontractor and that his contract was still in force, yet we should hold that the evidence shows that the Modern Steel Structural Company, the original contractor, like the owner in the Claffy case, "never parted with the control and supervision of the building to any contractor, but \* \* retained control and supervision of the work." As to this, we can only say that the conscientious search for such evidence has failed to disclose it to us. It is true that the subcontract provides that in certain contingencies the Steel Company shall have the right "to enter upon and take possession of the work, and terminate the contract, but as we have before said, we think the weight of the evidence is that they never did so "take possession and terminate the contract". Nor do we think that the advancing to Gage of money to meet his payroll, nor under the circumstances of the case, the presence of signs on the derrick and the steel work (if it be conceded that such signs were there before the accident) is sufficient to establish



erty of the Steel Company, and that the work was "erected by the Steel Company", militate against this conclusion. The signs, whenever they were put up, so far as they were not advertisements, were apparently designed, as Horsbach says they were, to protect the derrick from Gage's creditors, and would have nothing necessarily to do with "charge" or "control" of the work.

Nor does the evidence of the inspection by the architects nor of the activities of Croft in hurrying the work and in such attention to the payrolls as would insure the money advanced by the Steel Company going to its proper end, establish any retention of control so as to make it legally possible to hold the Steel Company in "charge" of the erection.

To sum up our conclusions, we are of the opinion that the accident occurred solely through the negligence of Keetley in giving the order, and that the "ducking" of the derrick did not contribute to it.

But even if this last question should be for the jury, we do not think this judgment could be allowed to stand. If it inheres in the verdict that the contract between the defendants had been cancelled when this accident occurred, it was against the weight of the evidence on that point and should be set aside.

If this finding does not inhere in the verdict there is no other ground for holding the Modern Steel Structural Company liable.

The weight of the evidence is clearly that it did not retain or have control or charge of the erection if Gage was at the time of the accident an independent subcontractor. The statute of June 3, 1917, therefore does not impose on it a statutory duty.

NOTES

These views render it unnecessary for us to discuss any of the sixty-eight instructions which were given to the jury or the objections made by appellee to rulings on evidence.

In the appeal 18463 the judgment of the Circuit Court must be reversed. Inasmuch as time might be, although the Modern Steel Structural Company can not be, held liable under the record that has come to us, the cause is remanded to the Circuit Court.

REVERSED AND REMANDED.

The writ of error in No. 18786 is dismissed.

WRI OF ERROR DISMISSED.

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(3)

$$f(x) = \frac{1}{2} \log \frac{1+x}{1-x}$$

WILLIAM W. MORRIS et al.,  
Defendants in Error,

vs.

MUTUAL MANUFACTURED ICE CO.,  
a corporation, et al.,  
Plaintiffs in Error.

ERROR TO THE SUPERIOR COURT  
OF COOK COUNTY.

189 I.A. 608

MR. PRESIDING JUSTICE BLOCH

DELIVERED THE OPINION OF THE COURT.

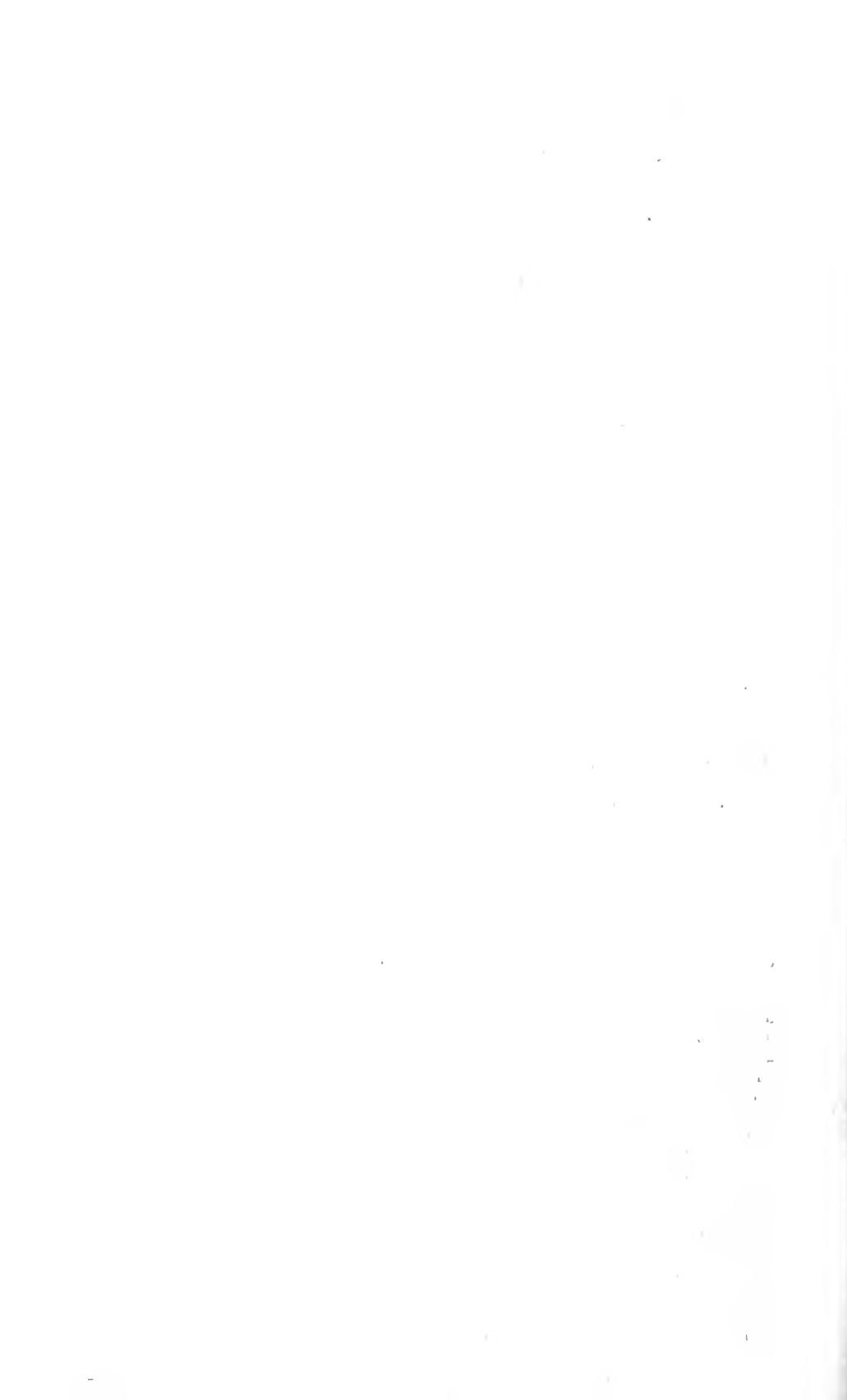
This is a peculiar case. The plaintiffs below brought a bill of complaint on the Chancery side of the Superior Court of Cook County seeking a permanent injunction against the defendants operating its plant and establishment in such manner as to emit certain described noises and stenches.

The bill in usual form prayed, in addition to the writ of summons, for a writ of injunction against such operation, "until the further order of the Court" - a plain prayer for a preliminary pendente lite injunction.

Application was made for such an injunction and on notice and affidavits, the usual form of a preliminary injunction was ordered on January 2, 1913. The order reads -

"On motion of solicitor for complainants and upon the reading of the bill of complaint and accompanying affidavits, it is ordered that a writ of injunction issue in the above entitled cause as prayed in said bill of complaint commanding the defendants herein, its and their agents and employees and all persons acting under them, to wholly desist and refrain from operating said plant and establishment of the defendant Mutual Manufactured Ice Company in such manner that the same emits continual, unusual, habitual, disturbing, irritating and harrassing noise and noises, and from habitually emitting or causing to be emitted gases, odors and stench from said plant and establishment of said Mutual Manufactured Ice Company, as described in the bill of complaint herein UNTIL THE FURTHER ORDER OF THIS COURT, upon the complaint of William W. Morris or some of the complainants filing with the Clerk of this Court a bond in the form used in this Court in the penal sum of fifteen hundred dollars with surety or sureties to be approved by the Court."

Such a bond was duly filed and approved on said





9th day of January, 1913. February 21, 1913, an answer was filed in behalf of the actual Manufactured Ice Company, Jacob M. Frost, Gaylord L. Barwell and Nicholas J. Ehrenman, and on May 21, 1913, the solicitor for these defendants gave notice to the solicitors for complainants that on May 26, 1913, he should move the Court "to vacate and set aside the injunction heretofore granted in said cause."

Various affidavits, copies of which appear in the transcript of record before us, seem to have been thereafter filed on behalf of the defendants in the office of the Clerk of the Superior Court, but nothing appears to have been done towards making said described motion or pressing a hearing on the same until June 30, 1913, when the record shows that the defendants "upon the pleadings and affidavits presented and filed in the said cause moved the Court to dissolve the injunction heretofore granted in the said cause and to dismiss the bill of complaint for want of equity." The motion was on the same day denied by an order in the following words:

"On motion of solicitor for complainants the motion of the defendants herein to dissolve the injunction heretofore granted herein and to dismiss the bill of complaint for want of equity is denied, and the defendants pray an appeal from said order denying said motions, which appeal is allowed to the Appellate Court of the First District upon the defendants filing a certificate of evidence herein in sixty days and a bond in good and sufficient surety in the sum of Two hundred and Fifty Dollars in 60 days."

A certificate of evidence was afterwards filed, consisting of copies of the affidavits read and heard on said June 3, 1913, for and against said motion, but the appeal was not perfected by the filing of any bond.

September 26, 1913, however, a writ of error was sued out of this Court by the actual Manufactured Ice



Company, Jacob L. Frost, Gaylord A. Harvell and Nicholas Harshman, reciting an allegation that error had intervened in the "record and proceedings as also in the rendition of the judgment of a plea" in the Superior Court between the complainants and defendants named. When the transcript of the record showing only the matters above set forth was filed in this Court, in accordance with said writ, errors were assigned on it as follows:

That the Court erred in denying defendants' motion to dissolve the injunction in said cause, in denying the defendants' motion to dismiss the bill of complaint for want of equity, in allowing the injunction to issue on the showing made in the bill and affidavits and in accepting the bond offered.

There is a statutory right of appeal in a certain way and under certain conditions given by Section 123 of the Practice Act to persons against whom interlocutory injunctions have been granted or whose motions to dissolve such injunctions have been overruled; but we know of no law which permits us on a writ of error to take jurisdiction of a purely interlocutory order, such as is the one complained of here. It is only to reverse final judgments, orders or decrees of the inferior courts that such a writ of error properly lies, and it is only in cases of such final judgments that we can act on a writ of error otherwise than to dismiss it, as we are forced to do in this case.

The point seems to have been ignored by both the parties, who have argued the merits of the injunction order. We cannot concern ourselves with those merits.

The writ of error is dismissed.

WRIT OF ERROR DISMISSED.



JAMES KARIABOSES,  
Defendant in Error,

vs.

RALPHIMOS BROS. ICE CREAM  
& CANDY CO.,  
Plaintiff in Error.

APPEAL TO THE HONORABLE  
COURT OF CHICAGO.

189 I.A. 819

BY PRESIDING JUSTICE BROWN

DELIVERED THE CLERK OF THE COURT.

The only questions in this cause in the Court below were of fact. One was as to the amount of monthly wages which the plaintiff had been promised by the defendant for his work. The amount which the defendant's witnesses swore to was used as the basis of the judgment rendered. It was \$20 a month from November 17, 1912, to April 14, 1913, which is as near \$22 as it could well be made. The evidence justifies the allowance of wages for that length of time.

As there are no cross errors there is nothing for either party to complain of in this, although the plaintiff claimed more on the trial.

The other question was whether there was any agreement that any part of those wages should be applied on an alleged sale of a candy shop or business by the defendant to the plaintiff. The plaintiff negatived this by his testimony, swearing that the defendant wanted him to buy the place, and that he took possession of it with the understanding that if he liked it he should buy it and if he didn't like it the defendant was to pay his wages while he worked in it; that he didn't like it and left it and demanded his wages, which the defendant refused to pay him.

Although the defendant denied this, the Court was justified in finding with the plaintiff between the two



stories told at the trial. It is certain that the defendant took the place back and recouped my sale, if there was one, without returning to the plaintiff the amount (\$40) which its manager (but not the plaintiff) says was paid in cash on account of the purchase price. It is also certain the plaintiff was a minor, and that he worked from November 17, 1912, to March 6, 1913, for the defendant at the factory of the latter and was working in the shop which was the subject of the negotiation from March 6 to April 14, 1913.

We see no more reason to disturb this judgment now than we did when on the presentation of the defendant's case ex parte in January last we refused to make the writ of error a supersedeas.

The judgment of the Municipal Court is affirmed.

APPRINTE.





JOHN V. BERG for the use of  
EDGAR F. SENNEY and ROWLAND  
T. ROGERS,

Defendant in Error,

vs.

L. E. RANDALL,

Plaintiff in Error.

BRANCH TO THE MUNICIPAL COURT  
OF CHICAGO.

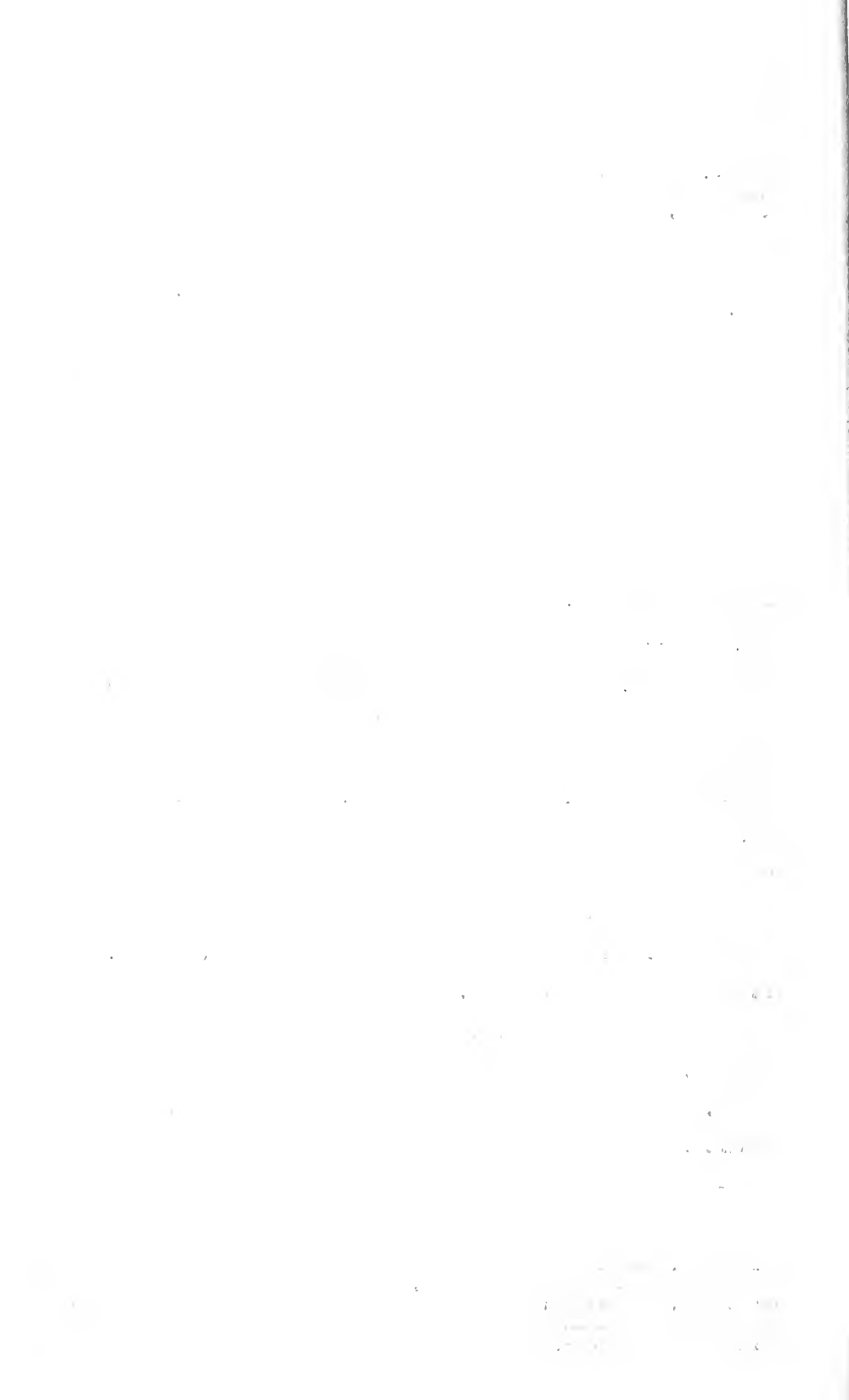
189 I.A. 627

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

February 24, 1913, an affidavit of one W. L. Fisher was filed in the clerk's office of the Municipal Court of Chicago, setting forth that on January 9, 1913, a judgment had been rendered by said Court for \$105 and certain costs of suit, in favor of Edgar F. Senney and Rowland T. Rogers against John V. Berg; that an execution on said judgment had been returned entirely unsatisfied, and that one L. E. Randall was believed to be indebted to said Berg and to have effects, etc., of said Berg in his possession. A garnishee summons in a case of "the Fourth Class" was accordingly issued against said Randall "to answer unto John V. Berg for use of Edgar F. Senney and Rowland T. Rogers", on said February 24th, which was duly returned as served on Randall on the same day, commanding said Randall to appear on March 10, 1913. March 10, 1913, Randall was called but did not appear, and "a conditional judgment" was entered against him "by default for want of an appearance", the form of the judgment being-

"Wherefore it is considered by the Court that the defendant for the use of the plaintiff have and recover from said garnishee the sum of One hundred Twelve and 10/100 Dollars, being the amount due this day on the judgment against the original defendant, unless said garnishee after being duly served with a writ of scire facias to be issued herein shall show cause, if any said garnishee have, why this conditional judgment should not be



confirmed and made final for said amount.

"It is further ordered that a writ of scire facias issue out of this Court against said garnishee as provided by law, commanding said garnishee to show cause why said conditional judgment should not be confirmed and made final."

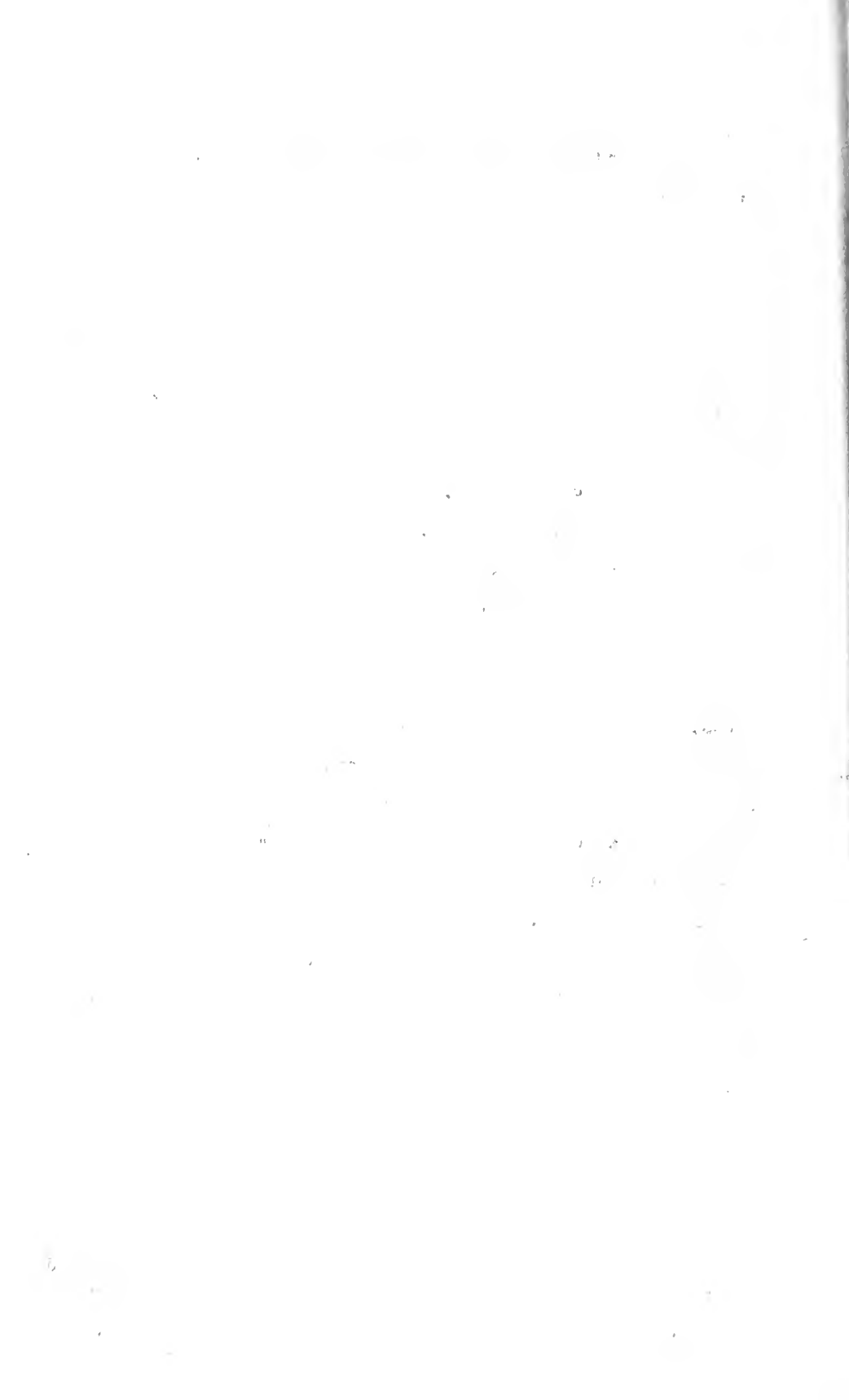
This was strictly in accordance with the procedure prescribed by Section 8 of the "Act in Regard to Garnishment".

March 12, 1913, a writ of scire facias issued to summon Randall to show cause on March 25th why final judgment should not be entered against him. This writ was served on March 13, 1913, and duly returned.

March 25, 1913, Randall was again called and not appearing was again defaulted, and it was "considered by the Court that the defendant have judgment" (for the use of the plaintiff) "on the default of the garnishee entered herein after the service of the writ of scire facias issued in this cause and upon the conditional judgment heretofore entered herein, which conditional judgment is hereby confirmed and made final as of the 10th day of March, 1913, and that the defendant have and recover of and from said garnishee the sum of One hundred Thirteen and 10/100 Dollars." This also was in accordance with said section 8.

March 26, 1913, Randall appeared and moved that the judgment of March 25th be set aside, presenting in support thereof a sworn petition, in which he set forth that when he was first served with summons he was not indebted to John V. Berg and had been at no time since; that when he was first served with summons he was about leaving the city and notified Seney, one of the plaintiffs, to this effect; and also that he was not indebted to Berg; that Seney told him that he would consent to have the matter continued -

"and relying on such promise petitioner left the city and paid no further attention to the matter until he was served with a scire facias to appear in Room 906 City Hall at 9:30 A. M. on March 25, 1913; that he did appear at said time and place, and after sitting in the court room until about 10:30 A. M. and



not having heard the case called he inquired its status of the clerk, who informed petitioner that the case was the first one called and that judgment had been entered versus petitioner."

In the Statement of Facts, which is a part of the transcript of record before us, the Judge of the Municipal Court certifies that the motion to vacate was entertained by the Court and continued for hearing until April 16, 1913; that said motion to vacate said judgment came on for hearing on said petition and was continued by the Court at various times until the 9th day of December, A. D. 1913, when the defendant not appearing the Court overruled the motion of defendant to vacate the judgment entered on March 25, 1913, and ordered that said judgment stand. A writ of error has been sued out of this Court to reverse the judgment against Randall. We do not see on what reasonable ground such a reversal can be asked. There was no showing of proof even of the insufficient allegations of the petition to vacate the judgment except the affidavit attached to the petition. Mr. Randall seems to have been treated with consideration by the Court, but did not choose to take advantage of it. The excuses alleged for allowing the two judgments to go were not sufficient in themselves and they were not proven even when an opportunity was given.

The contention of the plaintiff in error's counsel that it was necessary for the plaintiff before taking judgment against Randall to prove the judgment on which the garnishment proceeding was based, is without merit. It was set up in the affidavit for the garnishee summons and the default of the garnishee admitted it. The statute was followed. Had the garnishee answered there would have been no default and no admission and the cases cited by the plaintiff in error would have been in point. As it is, they are not.

The judgment is affirmed.

AFFIRMED.



THOMAS J. HEALTY,  
Defendant in Error,

vs.

H. STERN,  
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT  
OF CHICAGO.

109 I.A. 628

MR. PRESIDING JUSTICE BROWN  
DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment of the Municipal Court of Chicago rendered December 19, 1913, in an action brought in that Court May 8, 1913. We particularly mention these dates because the defendant in error vigorously insists that the question of the weight of the evidence can not be considered in this Court, inasmuch as the cause was tried without a jury and no exception was taken to the entry of the judgment, although the entry of such a judgment had been resisted and a motion to vacate it was made immediately thereafter. To this position the defendant in error cites *Blake v. DeJonghe Hotel Co.*, 263 Ill., 471. But this case, although full authority for the doctrine stated by the plaintiff in error, so far as cases coming from the Municipal Court before the amendment of May 31, 1911, of section 81 of the Practice Act, can hardly, in view of what is said in the opinion, be considered as such authority as to cases brought after that amendment.

Without deciding, therefore, whether the plaintiff in error in this case is in a position to raise the question indicated, we have considered it. But we find no reason for our interference.

Practically the only issue in the case was whether a sale of scrap iron was made according to the weights





at Forest Park, from which it came, or according to the weights at Chicago on the Chicago & Great Western team tracks. If the former alternative is the correct one, the judgment of \$349.56 in favor of the plaintiff below should be reversed. If the latter is true, then the judgment should stand. The testimony is conflicting and the correct answer perhaps not without difficulty. But we are not prepared to say that the Court below decided it against the manifest weight of the evidence.

The other points made by the plaintiff in error are without merit.

The judgment of the Municipal Court is affirmed.

AFFIRMED.



CITY OF CHICAGO,  
Defendant in Error,

vs.

MARY PERKINSON,  
Plaintiff in Error.

ERROR TO THE MUNICIPAL COURT  
OF CHICAGO.

109 I.A. 630

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The defendant Perkinson, plaintiff in error here, was charged in a complaint in writing with a breach of the peace in violation of Section 2012 of the Chicago Code of 1911. Defendant was in possession of the premises 25 Market street, and a horse and wagon was left in the street in front of a portion of the premises occupied by her. She led the horse out to the middle of the street and left the horse and wagon there in the car tracks. She was arrested by a police officer and the charge on which she was tried filed against her. Section 2012 was not offered in evidence, but Sections 2439 and 2499 of the Municipal Code were offered and admitted. The record does not contain the Sections of the Code admitted in evidence and we cannot take judicial notice of ordinances.

Sixby v. C. C. Ry. Co., 26 Ill., 478.

The jury found the defendant guilty of violating Section 2012, which as has been said, was not even offered in evidence, while two other Sections of the Code were admitted in evidence but are not in the record.

If it be assumed that defendant was found guilty of making, etc., "an improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace in violation of Section 2012", which was the charge under which the case was submitted to the Court, then in the opinion of a ma-



majority of the Court the acts and conduct proved do not show a breach of the peace or the commission of an act which might tend to a breach of the peace.

The judgment of the Municipal Court is reversed and the cause remanded.

REVEREND AND BELANDED.



ROBERT GRAHAM,  
Appellee,

vs.

CHARLES E. HAGMANN,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COCK COUNTY.

189 I.A. 631

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$2000 recovered by the plaintiff in tort for negligence. An automobile owned and driven by the defendant was going west in Jackson boulevard and came in collision with a wagon in which plaintiff was riding going north in Roman avenue. As a result of the collision the wagon was overturned, plaintiff thrown out and injured.

The evidence is conflicting; that for the plaintiff tending to show that the automobile ran into the wagon when it was on the east side of Roman avenue and but a few feet south of the north line of Jackson boulevard; and that for the defendant tending to show that the driver of the automobile when he saw the wagon stopped his machine and the wagon ran into it and thereby was overturned. Some of the witnesses for the defendant agree with those for the plaintiff as to the place of the collision, and others say that the wagon was passing along the west side of Roman avenue.

We think that from the evidence the jury might properly find that the automobile ran into the wagon; that the street intersection was well lighted by electric lights and that by the exercise of ordinary care the driver of the automobile could have seen the approaching wagon and stopped his car in time to avoid striking the wagon, or turned his car to the left and passed behind the wagon. Schultz, a wit-





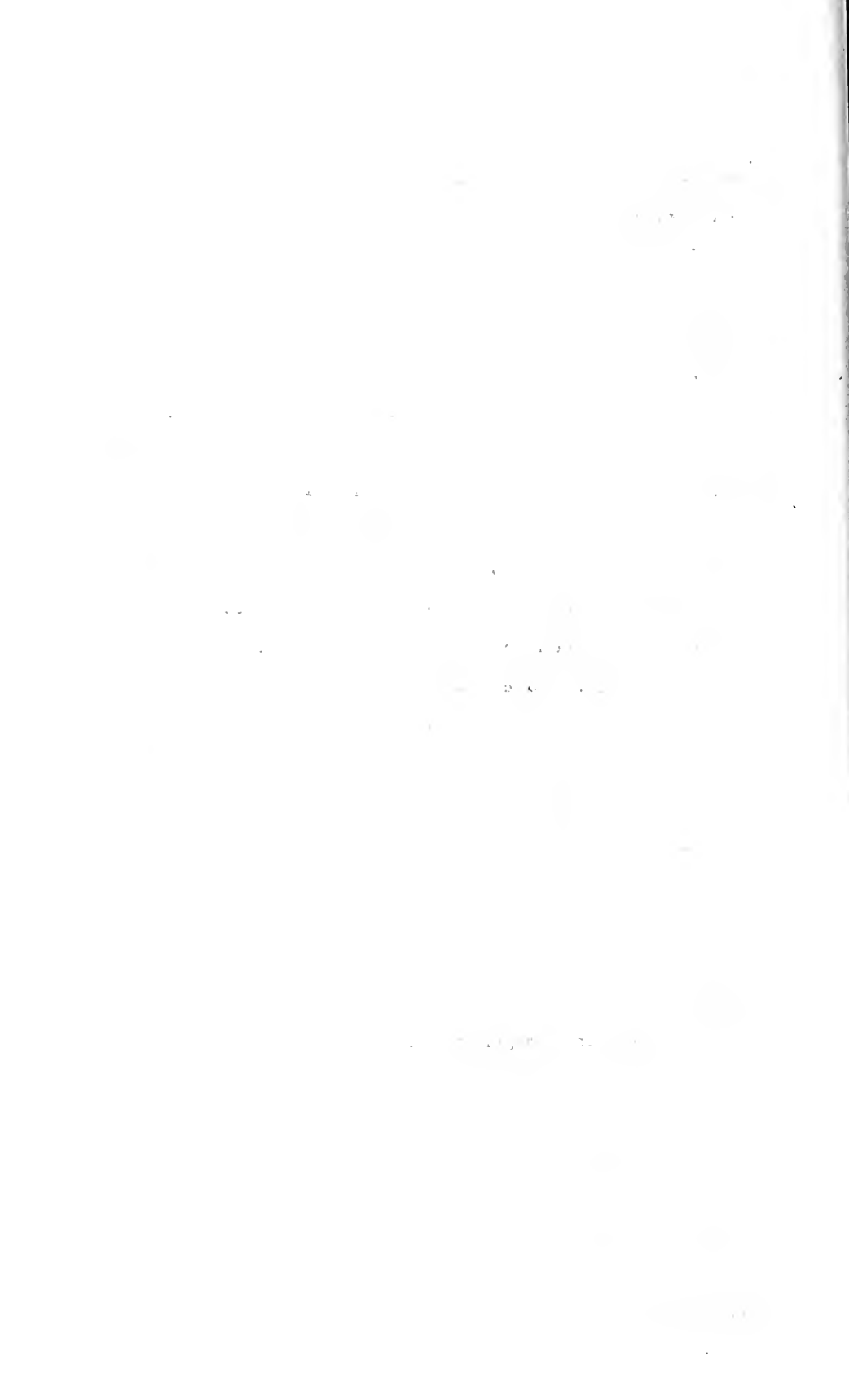
ness called by defendant, who was in the automobile with defendant, testified that when he first saw the wagon it was six feet from the south line of the boulevard. O'Connor, a witness called by the defendant, testified that he saw the collision and saw the automobile hit the wagon and it tipped over. We cannot say that from the evidence in the record the jury might not properly find that the defendant was guilty of negligence in operating his car which directly caused or contributed to plaintiff's injury.

The contention of the defendant that the plaintiff was guilty of contributory negligence is without merit. Plaintiff and three other men went to the house of Heise Saturday afternoon to move a small frame building. Knightly came to Heise's house with a wagon at 7 o'clock. It was then raining and the men at Heise's house remained there until about ten o'clock. Heise's house was about two miles south of Jackson boulevard and plaintiff's about the same distance north. They drove to Roman avenue and then north to Jackson boulevard. Knightly, Williams and Hickey sat on the front seat and plaintiff and his son at the rear end of the wagon on a bale of hay, and Hickey drove the horse. Plaintiff had no control over the horse. Knightly was taking plaintiff and his son home in a wagon which he owned and his employee was driving. Under such circumstances the negligence, if any, of the driver or of the owner of the horse cannot be imputed to the plaintiff.

We find in the record no errors in procedure sufficient to warrant or require a reversal of the judgment, and we do not think that the judgment should be reversed on the ground that the damages awarded are excessive.

The judgment is affirmed.

AFFIRMED.



156 - 20079  
CITY OF CHICAGO,  
Defendant in Error,  
vs.

PAUL J. GIMRICH,  
Plaintiff in Error.

157 - 20080  
CITY OF CHICAGO,  
Defendant in Error,  
vs.

JOSEPH F. SAGO,  
Plaintiff in Error.

158 - 20081  
CITY OF CHICAGO,  
Defendant in Error,  
vs.

JOSEPH BLACHER,  
Plaintiff in Error.

159 - 20082  
CITY OF CHICAGO,  
Defendant in Error,  
vs.

WILLIAM BYKOWSKI,  
Plaintiff in Error.

APPEAR TO THE

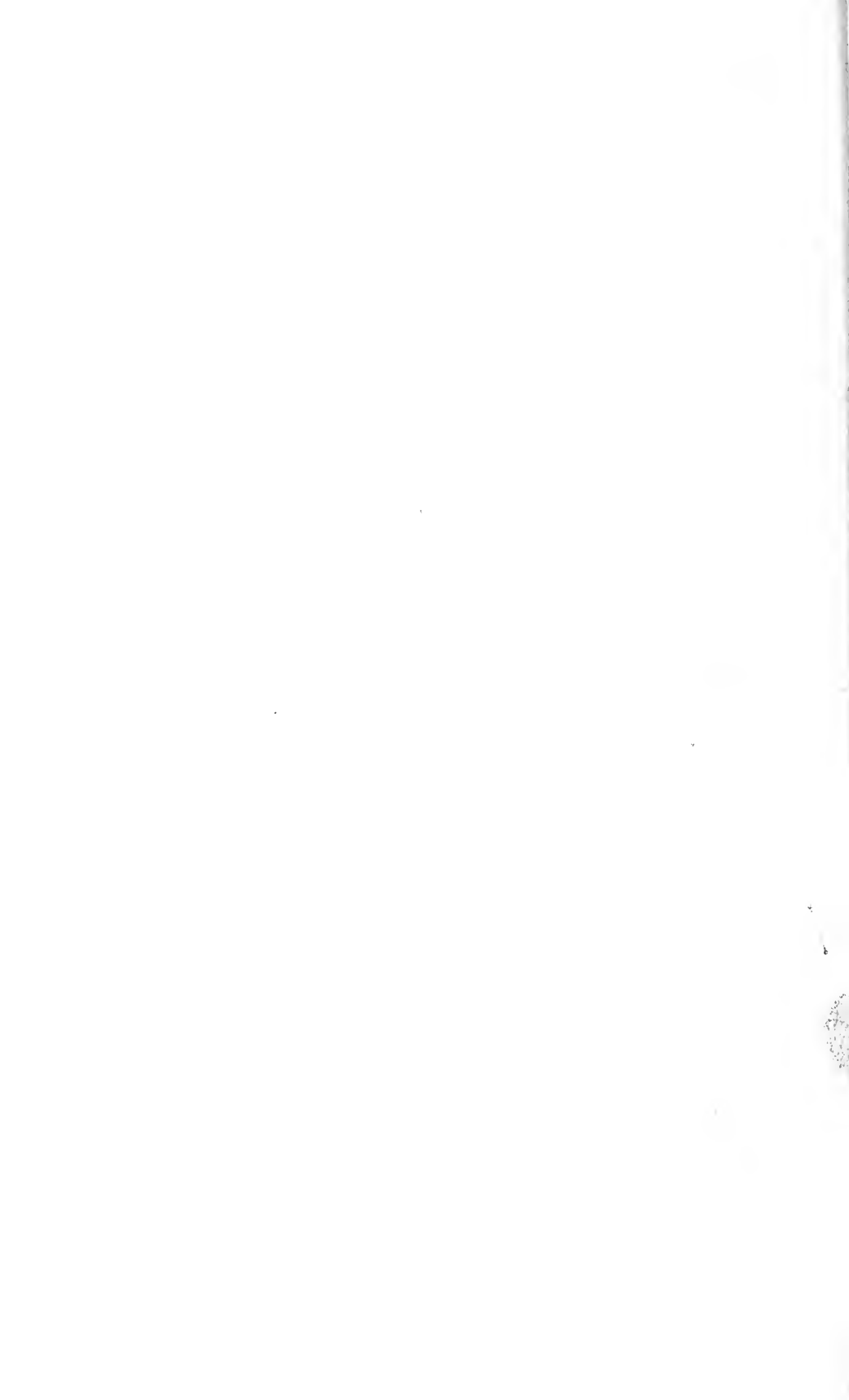
MUNICIPAL COURT  
OF COOK COUNTY.

1891.A. 632

MR. JUSTICE EARLE DELIVERED THE OPINION OF THE COURT.

Each of the plaintiffs in error was found guilty by a jury in the Municipal Court of a violation of Section 2012 of the Municipal Code of Chicago and a fine of \$1.00 assessed against him. The Court entered a judgment on each verdict and each defendant sued out a writ of error and by agreement the causes were submitted in this Court on the record, abstract and briefs filed in No. 20079. The defendants were together, acting in concert when the alleged violation of the ordinance occurred, and the judgment should be affirmed as to all of the defendants or reversed as to all.

Noble street runs into Milwaukee avenue from the



North. Defendants were passengers on a south-bound Milwaukee <sup>Poble</sup> street avenue car and were given transfers. They took a car going northwest in Milwaukee avenue and asked for one transfer to Ashland avenue, which runs north and south. The conductor refused to give such transfer and told the defendants that none of them could ride farther than Division street and Ashland avenue. There was a car line on Division, an east and west street, to which defendants might have transferred if they had taken a north-bound car on Poble street. When the Milwaukee avenue car reached Division street the conductor insisted that the defendants leave the car or pay another fare, but they refused to do either.

The first contention of the plaintiffs in error is that the judgments must be reversed because Section 2012 of the Code is not in the record. The Municipal Court takes judicial notice of ordinances, but this Court does not. We think, however, that it sufficiently appears from the record that the ordinance which the defendants were charged with violating prohibited the making, etc., of "an improper noise, disturbance, breach of the peace or diversion tending to a breach of the peace." We also think that if the question is properly brought before us for review, without a motion for new trial preserved in the stenographic report, a question on which we express no opinion, that from the evidence the jury might properly find the defendants guilty of violating Section 2012 as charged. Even if the defendants had the right to remain on the car, they should have submitted, for the time being, to the order of the conductor and sought redress by a civil action.

Riley v. C. C. Ry. Co., 169 Ill., 384;

Pa. H. R. Co. v. Connell, 112 id., 295;

People v. Hart, 156 Ill. App., 523.



It is not material to the questions involved in this case that the defendants were arrested without a warrant.

Chicago v. Smith, 159 Ill. App., 73.

The cases were given to the jury with leave to seal and separate and the court adjourned for the day. Each verdict as announced the next morning found a defendant guilty but did not fix the amount of his fine. The Court directed the jury to retire and correct their verdict, and they did so by fixing the fine of each defendant at \$1.00. In this there was no error.

Schmidt v. C. C. Ry. Co., 239 Ill., 494.

Each record is, in our opinion, free from error and each judgment is affirmed.

JUDGMENTS AFFIRMED.





ARNOLD HOLINGER, Trustee, et al.,

v.

Bill.

HARRIET E. DICKINSON et al.

JULIUS STICKERT,

Plaintiff in Error,  
(Cross-Bill)

vs.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

ARNOLD HOLINGER, Trustee, LEWIS  
E. CHILMAN, ARTHUR W. DICKINSON,  
HARRIET E. DICKINSON and KATHERINE  
W. CHILMAN,  
Defendants in Error.

189 I.A. 634

MR. JUSTICE BARGER DELIVERED THE OPINION OF THE COURT.

Defendant in error Holinger, trustee, etc., filed in the Superior Court a bill to foreclose a trust deed in the nature of a mortgage, to which plaintiff in error Stickert was made a defendant, and filed an answer and cross-bill. The Court sustained a demurrer to his cross-bill, dismissed the same and entered a decree of foreclosure. Stickert prosecuted an appeal to this Court and assigned for error the order sustaining the demurrer to his cross-bill and dismissing the same. We held in that case that the appeal did not bring before us the error assigned, and affirmed the decree. He now on the same record prosecutes this writ of error.

The pleadings are sufficiently stated in the opinion filed on the former appeal - 183 Ill. App., 122. Stickert, according to his cross-bill, purchased the mortgaged property of the mortgagor, Dickinson. But the trust deed was prior in time to such purchase and of course paramount. It gave to Stickert no right to delay the proceedings

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to foreclose while he proceeded to an accounting with the mortgagor. To permit him to do so would unnecessarily incumber the record with questions not necessarily or even properly involved in a proceeding to foreclose. The foreclosure should be had as directly and speedily as possible and other matters and other rights should be relegated to other suits, so far as that can be done without injustice to any.

Trust Co. v. L. L. and T. Ry. Co., 41 Fed. 8.  
The decree is affirmed.

AFFIRMED.













Illinois App. Unpublished Ops.

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